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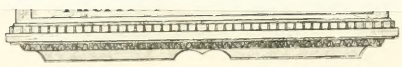

American Casebook Series

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CASES

IN

QUASI CONTRACT

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY

EDWARD S. THURSTON

PROFESSOR OF LAW
IN THE UNIVERSITY OF MINNESOTA

AMERICAN CASEBOOK SERIES

WILLIAM R. VANCE
GENERAL EDITOR

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THE AMERICAN CASEBOOK SERIES

THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. Until 1915 this preface appeared in each of the volumes published in the series. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond, in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements:

"To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is to-day the principal method of instruction in the great majority of the schools of this country."

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on "The Case Method in American Law Schools." Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence

64365

of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science."

Turning to the case method Professor Redlich comments as follows:

"It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law."

The general purpose and scope of this series were clearly stated in the original announcement:

"The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limi-

tations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. * * * If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. * * *

"The following subjects are deemed essential in that a knowledge of them (with the exception of International Law and General Jurisprudence) is almost universally required for admission to the bar:

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Agency.
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Bills and Notes.
Carriers.
Code Pleading.
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Conflict of Laws.
Constitutional Law.
Contracts.
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Criminal Law.
Criminal Procedure.
Damages.
Domestic Relations.
Equity.
Equity Pleading.
Evidence.
Insurance.
International Law.
Jurisprudence.
Legal Ethics.
Partnership.
Personal Property.
Public Corporations.
Quasi Contracts.
Real Property.
Sales.
Suretyship.
Torts.
Trusts.
Wills and Administration.

"International Law is included in the list of essentials from its intrinsic importance in our system of law. As its principles are simple in comparison with municipal law, as their application is less technical,

and as the cases are generally interesting, it is thought that the book may be larger than otherwise would be the case.

"The preparation of the casebooks has been intrusted to experienced and well-known teachers of the various subjects included, so that the experience of the classroom and the needs of the students will furnish a sound basis of selection."

Since this announcement of the Series was first made there have been published books on the following subjects:

Administrative Law. By Ernst Freund, Professor of Law in the University of Chicago.

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It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

WILLIAM R. VANCE,
General Editor.

JUNE, 1921.

TABLE OF CONTENTS

CHAPTER I

Introductory—Nature of Quasi Contract

Section		Page
1.	Sources and Scope of Quasi Contract	1
	I. Noncontractual Obligation to Pay a Sum of Money	1
	(A) Customary or Official Obligation	1
	(B) Statutory Obligation	4
	(C) Obligation Created by a Record	9
	II. Obligation to Account—Unjust Enrichment	11
2.	Distinction Between Contract and Quasi Contract	23
	I. In General	23
	II. Construction of Statutes	33
	(A) The Statute of Limitations	33
	(B) Statutes Regulating Procedure	37
	(C) Stockholders' Statutory Liability	44
	(D) Contract Clause of Federal Constitution	48

CHAPTER II

Benefits Conferred by Mistake

1.	The General Doctrine: Mistake of Fact	51
	I. Fundamental Distinctions	51
	(A) Mutual Mistake—Unilateral Mistake	51
	(B) Voluntary Payment and Compromise	64
	(C) Mistake as to Collateral Matters	75
	II. Defenses	82
	(A) Retention of Benefit by Defendant not Unconscionable	82
	(B) Negligence	89
	(C) Change of Position by Defendant	96
	(D) Purchase for Value	105
	III. Notice and Demand—Accrual of Cause of Action	111
2.	Specific Applications of the Doctrine	119
	I. Mistake as to Existence of a Contract Between the Parties	119
	II. Mistake as to Title to Property which is the Subject-Matter of a Contract	141
	III. Mistake as to Existence of Subject-Matter of a Contract	152
	IV. Mistake as to Nature of Subject-Matter of a Contract	166
	V. Special Rules as to Negotiable Paper	179
3.	Mistake of Law	198

CHAPTER III

Benefits Conferred Under a Contract Which Has Been Partially Performed

1.	Further Performance Impossible	233
	I. By Defendant	233
	II. By Plaintiff	246

Section Page
2. Contract Illegal 268
3. Contract Unenforceable Because of Statute of Frauds..... 312
I. Defendant Repudiates..... 312
II. Plaintiff Repudiates..... 341
4. Repudiation or Substantial Breach..... 352
I. By Defendant 352
II. By Plaintiff 386

CHAPTER IV

Benefits Voluntarily Conferred Without Contract

1. Plaintiff Acted Without Expectation of Compensation..... 428
2. Plaintiff Acted with Intention of Claiming Compensation..... 445

CHAPTER V

Benefits Conferred Under Compulsion

1. Discharge of Defendant's Obligation..... 484
I. In General 484
II. Indemnity and Contribution..... 496
(A) Between Co-obligors 496
(B) Between Tort-Feasors 502
2. Duress 516
3. Compulsion Through Legal Proceedings..... 535
4. Compulsion Coupled with Illegality..... 554

CHAPTER VI

Waiver of Tort..... 573

TABLE OF CASES

[CASES CITED IN FOOTNOTES ARE INDICATED BY ITALICS. WHERE SMALL CAPITALS ARE USED, THE CASE IS REFERRED TO IN THE TEXT]

	Page
ABBE v. MARR	296
Abbott v. Blossom	598
Abbott v. Inskip	345
Acheson v. Miller	504
Ada County v. Gess	227
Aiken v. Short	75
ALLEGHENY COUNTY v. GRIER	225
Allen v. Burns	392
Allen v. Hammond	154
Allison v. Bristol Marine Ins. Co.	235
American Life Ins. Co. v. McAden	366
Ankeny v. Clark	370
Anonymous	5, 233
Appleby v. Dods	250
Appleby v. Myers	267
Appleton Bank v. McGilvray	92
Armstrong County v. Clarion County	506
ARNOLD, IN RE	292
Arris v. Stukely	14, 573
Ash v. McLellan	94
Aspinwall v. Sacchi	502
Astley v. Reynolds	516
Atkinson v. Denby	561
Atlantic Coast Line R. Co. v. Schirmer	103
Avery v. Willson	391
BABCOCK v. THOMPSON	295
Bailey v. Bussing	504
Baker v. Courage	114
Baldwin v. Potter	310
BANK v. FONDA	42
BANK v. HULL	192
Bank of Chillicothe v. Dodge	232
Bannatyne v. MacIver	135
Barnes v. Shoemaker	449
Bartholomew v. Jackson	453
Bates v. Bigby	597
Bates v. New York Life Ins. Co.	522
Bechtel v. Chase	601
Benson v. Monroe	537
Bilbie v. Lumley	198
Bishop v. Brown	112
Bize v. Dickason	203
BIZE v. DICKASON	203
Blakely v. Muller & Co.	245
Bloxsome v. Williams	269
Boardman v. Ward	435
BOARD OF SUP'RS v. ELLIS	226
Bond v. Aitkin	129
Bonnel v. Foulke	13, 198
Boone v. Coe	330
Boston Ice Co. v. Potter	447
BOULTON v. JONES	449
Bowen v. Kimball	394
Braithwaite v. Akin	599
Brisbane v. Dacres	200
Bristow v. Eastman	23, 588
Britton v. Turner	413
Brown v. Brown	593
Brown v. Hodgson	491
Brown v. McIntosh	555
Brown v. McKinally	64, 535
Brown v. St. Paul, M. & M. R. Co.	385
Brown v. Woodbury	365
Browning v. Morris	279
Brundred v. Rice	591
Buel v. Boughton	84
Buffalo v. O'Malley	79
Buller v. Harrison	96
BUTTERFIELD v. BYRON	263
Byrd v. Boyd	406
Byrne v. Schiller	235
Campbell Printing Press & Mfg. Co. v. Marsh	362
CANAL BANK v. BANK OF ALBANY	190
Carpenter v. Northborough Nat. Bank	189
Carpenter v. Southworth	222
Carson v. McFarland	89
CATTS v. PHALEN	292, 300
Champlin v. Rowley	388
Champlin v. Rowley	390
Chandler v. Sanger	539
Chandler v. Webster	242
Chapman v. Cole	170
Chapman v. Haley	285
Chase v. Corcoran	454
Chase v. Dwinal	518
CHATFIELD v. PAXTON	204
Childs v. Harris Mfg. Co.	39
Christopher v. Norvell	44
Citizens' Bank v. Schwarzchild & Sultzberger Co.	191
City Trust, Safe Deposit & Surety Co. v. American Brewing Co.	497
Clark v. Manchester	373
Clark v. Mayor of New York	375

	Page
CLARK v. PINNEY	552
Clary v. Clary	437
Clay v. Yates	268
CLEARY v. SOHIER	263
Cleveland Cliffs Iron Co. v. East Itasca Mining Co	168
Clinton v. Strong	528
Coe v. Smith	240
Collier v. Coates	341
Concord Coal Co. v. Ferrin	450
Conner v. Henderson	178
Constantinides v. Walsh	477
Continental Life Ins. Co. v. Houser	369
Cooper v. Cooper	439
Core's Case	12
Cotnam v. Wisdom	461
Cox v. Prentice	166
Craft v. South Boston R. R.	138
Crawford v. Whittal	9
Cripps v. Reade	144
Cromwell v. Benjamin	466
Cromwell v. Norton	339
Crown Cycle Co. v. Brown	605
Culbreath v. Culbreath	213
Cunningham v. Reardon	475
Cutter v. Powell	249
Dalmouth v. Bennett	562
Dale v. Sollet	22
Danforth v. Dewey	356
Daniell v. Sinclair	220
Davidson v. Laughlin	375
Davis v. School Dist. No. 2	447
DAY v. KINNEY	177
Day v. New York Cent. R. Co.	324
Deaver v. Bennett	271
De Brauwere v. De Brauwere	466
Decker v. Pope	496
De Graff v. Ramsey County	532
De Montague v. Bacharach	360
Devine v. Edwards	54
Dickerman v. Lord	535
Diggs v. Kirby	144
DISBROW v. DURAND	435
Dorsey v. Jackman	141
Dowling v. McKenney	328
Duppa v. Gerard	3
Dupuy v. Roebuck	551
Durrant v. Ecclesiastical Com'rs for England and Wales	102
DUTCH v. WARREN	20
Duval v. Wellman	287
Earl of Lincoln v. Topcliff	12
Earle v. Bickford	147
Earle v. Coburn	460
Earle v. De Witt	144
Eastern Expanded Metal Co. v. Webb Granite & Construction Co.	275
Eaton v. Gladwell	397, 399
Edmunds v. Wallingford	486
Eicholz v. Bannister	148
Erkens v. Nicolin	216
Evans v. Miller	599
Exall v. Partridge	484
Fabian v. Wasatch Orchard Co.	331
Faircloth v. Kenlaw	320
Falcke v. Scottish Imperial Ins. Co.	456
Fargusson v. Winslow	522
Farmer v. Arundel	203
FARMER v. ARUNDEL	203
Farron v. Sherwood	382
Fay v. Oliver	361
Feeney v. Bardsley	394
Ferguson v. Carrington	603
First Nat. Bank v. Oberne	133
First Nat. Bank v. Sargeant	545
First Nat. Bank v. Van Vooris	43
Fisher v. Hildreth	273
Forbis v. Inman	453
Force v. Haines	460
Ford v. Stroud	335
Forsyth v. Ganson	470
Freeland v. Williams	50
FREEMAN v. JEFFRIES	115
FUEL CO. v. TUCK	42
Fuller v. Smith	186
Gay v. Mooney	315
Germania Bank of Minneapolis v. Boutell	184
Gillet v. Maynard	353
Gilmour v. Thompson	559
Gleason v. Warner	476
GOETZ v. BANK OF KANSAS CITY	195, 196
Gompertz v. Bartlett	168
Gordon v. Chief Commissioner of Metropolitan Police	306
GRAY v. BOSTON GASLIGHT CO.	511
Gray v. Roberts	278
Great Northern R. Co. v. Swaffield	460
Gregory v. Lee	32
Griffin v. Sansom	443
GRIGGS v. AUSTIN	234
Guetzkow Bros. Co. v. Breese	525
Hales v. Freeman	488
Hall's Ex'r v. Farmers' Bank of Kentucky	218
Hambly v. Trott	573
Hannay v. Guaranty Trust Co. of New York	197
Harris v. Lloyd	76
Harse v. Pearl Life Assur. Co.	270
HASTELOW v. JACKSON	284
Hathaway v. Delaware County	138
Haven v. Foster	228
Hawley v. Moody	321
Haynes v. Rudd	568
HAYNES v. RUDD	296
Hecht v. Batcheller	176
Heckman v. Swartz	566

	Page
Heiserman v. Burlington, C. R. & N. R. Co.	531
Hencke v. Twomey	47
Hendricks v. Goodrich	57
Hermann v. Charlesworth	282
Hertzog v. Hertzog	24
Hewer v. Bartholomew	11, 198
Hindmarch v. Hoffman	591
HIRST v. TOLSON	239
Hitchcock v. Giddings	154
Hobbs v. Boatright	302
HOBBS v. BOATRIGHT	291
HOFFMAN v. BANK OF MILWAUKEE	195, 196
Hogg v. Longstreth	486
Hoggan v. Cahoon	513
Holbrook v. Armstrong	312
HOLLAND v. RUSSELL	100
Holliday v. Coe	246
HOLMAN v. JOHNSON	299
Holmes, Booth & Haydens v. McGill	165
Hosmer v. Wilson	381
Houghton v. Danville	469
Howard v. Randolph	432
Hoyt v. Paw Paw Grape Juice Co.	340
Hunt v. Amidon	496
Hunt v. Silk	362
Hurley v. Lamoreaux	608
Hysell v. Sterling Coal & Mfg. Co.	264
Inhabitants of South Scituate v. Inhabitants of Hanover	445
Inhabitants of Town of Berlin v. School Soc. of New Britain	489
Irving v. Wilson	517
Jackson v. Atlanta	84
Jackson v. McKnight	86
JAMES, EX PARTE	223
Jenkins v. Tucker	474
Jennings v. Lyons	256
Joannin v. Ogilvie	540
Johnson v. Fehsefeldt	423
Johnson v. Saum	60
Johnson v. Torpy	503
Johnston v. Bank	186
Jones v. Hoar	595
Jones v. Insurance Co. of North America	127
Jones v. Judd	258
Jones v. Pope	33
Jones v. Ryde	170
Jordan v. Robinson	35
Kearley v. Thompson	278
Keeling v. Schastey & Vollmer	262
Kehoe v. Rutherford	377
Kelley v. Lindsey	132
Kelly v. Solari	89
Ketchum v. Evertson	402
Kicks v. State Bank of Lisbon	370
King v. Welcome	346
Kirkman v. Philips' Heirs	611
KITCHEN v. GREENABAUM	295
Ladd v. Barton	280
LA FONTAIN v. HAYHURST	438
Lakeman v. Pollard	255
LAMBERT v. HEATH	159
Lamine v. Dorrell	15, 573
Lane v. Shackford	344
Langevin v. St. Paul	77
Lawton v. Howe	112
Leather Mfgs. Bank v. Merchants' Bank	116
Lehigh Coal & Navigation Co. v. Brown	524
Lemon v. Grosskopf	310
Lightly v. Clouston	582
Limerick v. Lee	421
Lincoln (Earl) v. Topcliff	12
Lindner v. Cape Brewery & Ice Co.	408
LINDON v. HOOPER	521
LOCKMAN v. COBB	291
Lord North's Case	2
LOUISIANA EX REL. FOLSOM v. MAYOR OF NEW ORLEANS	51
Lowe v. Wells Fargo & Co. Express	55
Lowenstein v. Bache	517
LOWRY v. BOURDIEU	203, 204
Lynn v. Seby	426
Lyon v. Minor	461
McAfee v. Covington	48
McArthur v. Luce	72
McCammon v. Peck	240
McClellan v. Harris	257
Macclesfield Corp. v. Great Central Ry.	480
McClure v. Central Trust Co.	170
McCready v. Van Antwerp	500
McGonigle v. Klein	399
McMullen v. Hoffman	311
MAGUIRE v. STATE SAV. ASS'N	524
Manhattan Fire Alarm Co. v. Weber	478
Manitowoc Steam Boiler Works v. Manitowoc Glue Co.	397
Manthey v. Schueler	502
Marcotte v. Allen	221
Marriot v. Hampton	550
Martin v. McCormick	160
Martin v. Sitwell	126
Mason v. Waite	589
Mathie v. Hancock	457
Mayor of London v. Gorry	2
Mayor of York v. Toune	3
Mearkle v. Hennepin County	529
Meech v. Stoner	275
Mentone v. Athawes	260
Merchants' Ins. Co. v. Abbott	105
Merchants' Nat. Bank of Peoria v. Nichols & Shepard Co.	135

	Page
Mernagh v. Michols	412
Merritt v. American Dock & Trust Co.	453
Merryweather v. Nixan	502
Metzger v. Greiner	213
Meyer v. Richards	158
Michener v. Watts	280
Miller v. Goddard	421
Millett v. Holt	53
Miner v. Bradley	359
Mizell v. Watson	356
Montague v. Garnett	319
Moody v. Moody	472
Mooney v. York Iron Co.	380
Moore v. Nowell	38
Moore v. Vestry of Fulham	535
Morgan v. Groff	305
Morse v. Woodworth	567, 568
Moses v. Macferlan	17, 550
Mowatt v. Wright	71
Mumford v. Brown	482
Munro v. Butt	395
Munt v. Stokes	82
National Bank of New Jersey v. Berrall	193
NATIONAL BANK & LOAN CO. v. PETRIE	294
National Granite Bank v. Tyndale	130
National Life Ins. Co. v. Jones	66
Neal v. Coburn	181
Neate v. Harding	589
Nevada Co. v. Farnsworth	40
Newall v. Tomlinson	98
New York Life Ins. Co. v. Chittenden & Eastman	66
NIBLO v. BINSSE	263
Nicholls v. Skeel	556
Niedermeyer v. University of Missouri	525
Nimick v. Holmes	492
Noble v. Williams	446
Norden v. Jones	600
NORTHROP v. GRAVES	212
North's (Lord) Case	2
Norton v. Blinn	307
Norton v. Bohart	60
Norton v. Coons	498
Norton v. Marden	145
Noyes v. Pugin	380
O'Brien v. Young	40
Ogden v. Maxwell	528
Okerson v. Crittenden	274
Oom v. Bruce	269
Osborn v. Governors of Guy's Hospital	436
Otis v. Cullum	158
Oxendale v. Wetherell	386
Parks v. Morris, Layfield & Co.	609
Patterson v. Patterson	473
Patterson v. Prior	584
Patrick v. Putnam	256
Pease v. Howard	36
Pensacola & A. R. Co. v. Braxton	84
Perrott v. Perrott	200
Peters v. Railroad Co.	533
Philbrook v. Belknap	312
PHILLIPS, EX PARTE	458
Phillips v. Homfray	577
Phillips v. Hudson	147
Pickslay v. Starr	432
Pierpont v. Wilson	465
Pinches v. Swedish Evangelical Lutheran Church	396
Pool v. Allen	51
Porter v. Dunn	384
Posey v. Garth	404
Potter v. Carpenter	429
Preston v. Boston	547
Preston v. Neale	456
Price v. Neal	179
Proprietors of the Second Turnpike Road v. Taylor	6
Pulbrook v. Lawes	338
Quinn v. Hill	475
RAILWAY CO. v. SWAFFIELD	30
Ralli v. Troop	496
Ray v. Young	318
Reeder v. Anderson's Adm'rs.	454
Reina v. Gross	233
Reynolds v. Reynolds	314
Reynolds Bros. v. Padgett	585
Rheel v. Hicks	75
Rhodes, In re	32
Richards v. Allen	312
Riley v. Williams	349
Robinson v. Cummings	438
Robsert v. Andrews	11
Rogers v. Price	472
Rohr v. Baker	452
ROTH v. PALMER	606
Rouvant v. San Antonio Nat. Bank	187
Ruabon v. London Assur.	442
Rumford Chemical Works v. Ray	549
St. Joseph's Orphan Soc. v. Wolpert	429
St. Jude's Church v. Van Denberg	428
Salb v. Campbell	350
Sceva v. True	27, 461
Schultz v. Culbertson	565
Scott v. Board of Trustees of Town of New Castle	210
SEARS v. GRAND LODGE	70
Sergeant & Harris v. Stryker	594
Seymour v. Oelrichs	330
Sharkey v. Mansfield	112
Shaw v. Shaw	344
Sheibley v. Cooper	528
Shepherd v. Young	431
Sherwood v. Walker	175
Shute & Limont v. McVitie	408
Simmoneli v. White Star Line	132

	Page
Slayton v. McDonald	384
Smart v. Gale	151
Smart v. White	280
Smith v. Blachley	569
Smith v. Bromley	556
SMITH v. CUFF	560
Smith v. Neale	165
Smith v. Wooding	316
Smithwick v. Whitley	533
Snow v. Prescott	354
Solinger v. Earle	562
Spaulding v. Kendrick	591
Speake v. Richards	3
Spencer v. Parry	490
Spooner v. Thompson	133
Springs v. Hanover Nat. Bank	194
Stanley Bros. v. Corporation of Nuneaton	220
Steamship Co. v. Joliffe	7
Steele v. Williams	527
Stephens v. Board of Education	108
Stevens v. Fitch	553
Stewart v. Wright	287
Stockett v. Watkins	600
Stokes v. Lewis	445
Stong v. Lane	122
Strang, Steel & Co. v. A. Scott & Co.	496
Strickland v. Turner	152
Sturgis v. Preston	117
Taulbee v. McCarty	265
Taylor v. Hare	163
Taylor v. Root	37
Teasdale v. Stoller	553
Tenant v. Elliott	306
Thomas v. Brown	344
Tightmeyer v. Mongold	586
TILTON v. GORDON	354
Timmerman v. Stanley	363
Tinslar v. May	53
Todd v. Bettingen	324
Todd v. Leach	370
Todd v. Martin	459
Towers v. Barrett	352
Townes v. Cheney	260
Township of Cincinnati v. Ogden	467
Troy v. Bland	217
Trustees of Cincinnati Tp. v. Ogden	467
Tucker v. Denton	62
Turner v. Webster	119
Tyra v. Cheney	125
Ulmer v. Farnsworth	441
Union Stockyards Co. v. Chicago, B. & Q. R. Co	509
U. S. v. Pacific R. R.	442
Van Deusen v. Blum	128
Van Santen v. Standard Oil Co.	491
Van Valkenburgh v. Watson	466
Varnum v. Highgate	218
Vereycken v. Vanden Brooks	546
Vickery v. Ritchie	121
Viles v. Barre & M. Traction & Power Co.	387
Village of Morgan Park v. Knopf	227
Vischer v. Yates	270
Volker v. Fisk	489
Waite v. Shoemaker	425
Walden v. Veasely	4
Walker v. Conant	110
Walsh v. Fisher	255
Ward v. Hood	585
Ware v. Spinney	303
WASHINGTON GASLIGHT CO. v. DISTRICT OF COLUMBIA	511
WATSON, MATTER OF	458
Watson v. Cresap	157
Watson v. Donald	237
WATSON v. DUYKINCK	234
Watson v. Stever	597
Watts v. Lynch	274
Wayne County v. Reynolds	224
Webb v. Fulchire	281
Wells v. Porter	486
Wellston Coal Co. v. Franklin Paper Co.	375
Western Assur. Co. v. Towle	586
Westlake & Button v. St. Louis	523
Wheadon v. Olds	73
Wheaton v. Hibbard	554
Whincup v. Hughes	237
White v. Continental Nat. Bank	186
Whitfield v. Zellnor	255
Wilkinson v. Ferree	371
Wilkinson v. Lloyd	236
Williamson v. Johnson	438
WILSON v. RAY	560
Windbiel v. Carroll	65
Wojahn v. National Union Bank of Oshkosh	27
Wolfe v. Howes	251
Wood v. Boynton	172
Woodruff v. Claflin Co	87
Wooley v. Batte	503
Worley v. Moore	111
Wright v. Newton	235
Yatesville Banking Co. v. Fourth Nat. Bank	191
Young v. Chicopee	264
Young v. Cole	155

CASES

IN THE

LAW OF QUASI CONTRACT

CHAPTER I

INTRODUCTORY—NATURE OF QUASI CONTRACT

SECTION 1.—SOURCES AND SCOPE OF QUASI CONTRACT

I. Noncontractual Obligation to Pay a Sum of Money

(A) Customary or Official Obligation [1]

7 VINER'S ABRIDGMENT, 343—DEBT (K) 9.

If there be a custom that the collector of the rent of the Lord ought to pay 22s. to the Lord for the profits of the market of the Lord, the executor of the Lord may have debt for the 22s. without bringing a writ of account, for he is not a receiver of this but he ought to pay it whether he receives the profits or not. Y. B. 11 H. VI, 14 b (1432).

[1] The cases in this collection deal only with the obligation to pay money.

"Of a quasi contractual nature, it is submitted, is the duty of a carrier, founded upon the custom of the realm to receive and to carry safely. That the liability in such cases arises, not from contract but from a duty, is clear. While it is true that the liability is ordinarily described as one in tort, it is submitted that it has been so described because of the usual classification of legal rights into contracts and torts, and that since the obligation imposed upon the carrier is to act, the obligation is really quasi contractual in its nature, and not in the nature of a tort. If this be the proper classification of the duties imposed by law upon a carrier, it must necessarily be true of the common liability of an innkeeper to receive guests, or to keep their goods safely." Keener, Quasi Contracts 18.

See Bank of Orange v. Brown (1829) 3 Wend. (N. Y.) 158. (In an action against a common carrier for a loss of property arising from a breach of duty imposed by the custom of the realm "the plaintiff has his choice of remedies, either to bring assumpsit or case.") Morgan v. Ravey (1861) 6 H. & N. 265. (Action against the executor of an inn-keeper by a guest whose property had been stolen during the night. "We think the cases have established that

LORD NORTH'S CASE.

(Court of King's Bench, 1588. 2 Leon. 179.)

The Queen granted unto the Lord North and his heirs the fines pro licentia concordandi, and one would not pay him the fine; for which cause the Lord North brought an action upon the case against him and declared upon indebitatus assumpsit &c.

Godfrey moved this matter to the court to know their opinion if such action would lie for the matter or not.

Fennor, for a fine in a court-baron or court-leet debt lieth; but as he conceived here this action doth not lie, for it is a real fine and there is no contract between the parties; but the same is given by the law.

And some were of opinion that debt lieth for a relief, for there is a contract by fealty.

GAWDY, J., conceived that the action doth well lie; for it is not any casual profit and therefore debt lieth for it, although it be an inheritance: and see Dyer, 28 H. VIII, 24. The heir shall have an action of debt upon a nomine pœnæ reserved by his ancester.

WRAY, C. J. I do not see that he hath any other remedy, and therefore I am of opinion that this action will lie.

MAYOR OF LONDON v. GORRY.

(Court of King's Bench, 1676. 2 Lev. 174.)

Assumpsit for money due by custom for scavage; upon non assumpsit the jury found the duty to be due, but that no promise was expressly made; and whether assumpsit lies for this money thus due by custom, without express promise? was the question:

RESOLVED, it does, and judgment for the plaintiff.[2]

where a relation exists between two parties, which involves the performance of certain duties by one of them and the payment of reward to him by the other, the law will imply, or the jury may infer, a promise by each party to do what is to be done by him. We cannot distinguish this case from the case of a carrier." Per Pollock, C. B.) Chudnovski v. Eckels (1908) 232 Ill. 312, 83 N. E. 846. (Assumpsit lies against a carrier for breach of its duty to carry safely. "The law presumes or implies from the fact of receiving, as common carrier, the passenger to carry for hire, a contract." Such obligation is an "implied contract" within the statute conferring jurisdiction upon the municipal court of Chicago.) This last decision is criticized in 3 Illinois Law Review, 46.

In connection with the cases in the present section, dealing with the Sources and Scope of Quasi Contract, the Late Dean Ames' article on the History of Assumpsit, in 2 Harvard Law Review, 1, 53 (reprinted in 3 Select Essays in Anglo-American Legal History, 259), should be read. See also Ames' Lectures on Legal History, passim.

[2] Accord: The Barber Surgeons of London v. Pelson (1679) 2 Lev. 252. (Assumpsit lies for money forfeited by a by-law of a corporation for not serving in the office of steward of the company.) Mayor of London v. Hunt (1681) 3

DUPPA v. GERARD.

(Court of King's Bench, 1689. Comb. 163.)

Debt for fees of knighthood, and the plaintiff institul'd himself as gentlemen usher to the King, attendant on the King, and set forth a custom to have £5 of every one, that is made a knight. Judgment pro quer', and it was said by the Chief Justice, that it was so adjudged lately in C. B.

Nota.—It was alleged that Gerard was made a knight voluntarily.

MAYOR OF YORK v. TOUNE.

(Court of King's Bench, 1699. 1 Ld. Raym. 502.)

The plaintiffs brought indebitatus assumpsit against the defendant for a fine imposed upon him for not serving the office of Sheriff of the City of York, being duly elected according to the custom, and according to the custom fined for refusal, &c. And upon demurrer to the declaration the last paper day of this term Sir Bartholomew Shower for the defendant said, that the action in this case would not lie. And HOLT seemed to incline to the same opinion. And upon motion of the plaintiff's counsel, that it might stay till the next term, HOLT, Chief Justice, said, that it should stay till Dooms-Day with all his heart. But ROKEBY seemed to be of opinion, that the action would lie. Et adjournatur.

Note, a day or two after I met the Lord Chief Justice Treby visiting the Lord Chief Justice Holt at his house. And Holt repeated the said case to him, as a new attempt to extend the indebitatus assumpsit, which had been too much encouraged already. And Treby, Chief Justice, seemed also to be of the same opinion with Holt.[8]

SPEAKE v. RICHARDS.

(Court of Common Pleas, 1617. Hob. 206.)

Hugh Speake brought an action of debt of £523. 17s. against Edward Richards, late High Sheriff of the county of Southampton, and declared, that one Paramour and others were bound by recognizance in Chancery in £2000. to the plaintiff, and that after other process and

Lev. 37. (Assumpsit lies against the ship master to collect a customary duty on cheese brought into London in a ship, even though the ship master does not own the cheese.)

[8] In accord with the opinion of Rokeby, J., are Evelyn v. Chichester (1765) 3 Burr. 1717, and Whitfield v. Hunt (1784) 2 Doug. 727, and note. But Lord Holt continued irreconcilable. Anonymous (1702) 7 Mod. 12. (Holt, C. J.: "It has been held that an indebitatus assumpsit would lie for a customary fine of a copy holder; but he said he never could be reconciled to that opinion.")

judgment 10 Julii 14 Jac. the plaintiff sued a levari fac. to the defendant, returnable 15 Mich. which was delivered 1 Aug. whereupon the defendant levied the sum, and at the day returned that he had levied the same sum, quos paratos habeo, and yet did not deliver it in Court, per quod, &c. The defendant quoad £308 pleaded nihil debet, whereupon the plaintiff took issue, and as to the rest he pleads, that after the issuing of the writ, and before the return, scil. 31 Aug. he did pay unto the plaintiff the same sum, whereupon the plaintiff, by his acquittance the same day reciting that he had received it, did acquit him of it; whereupon the plaintiff demurred in law.

The first question in this case was, whether the action of debt would lie, because there was no contract between the plaintiff and the sheriff. But that was resolved by THE COURT that it would lie; for though there were no actual contract, yet there was a kind of contract in law, so it is ex quasi contractu. And therefore upon damages recovered in an action of trespass, the plaintiff shall have an action of debt; and by the same reason when the money is levied by the sheriff, so as the action ceaseth against the defendant, the same action is ipso facto by law transferred to the sheriff, having both the judgment to make it a debt, as before, and the levy to make him answerable, like unto the case of 1 H. VII of a tally delivered to the customer, as soon as money comes into his hands he is made a debtor. Quære, if an action of debt may not be had against the executor as a principal debtor, declaring of a devastavit by him. Debt lies by corporations for the penalties forfeited upon their laws, so for amerciaments in the court barons, so 11 H. VII, 14, for £3. forfeiture, upon a custom for pound-breach, & 34 H. VI, 36 & 9 E. IV, 50. It is holden that upon such levies by the sheriff, appearing upon record, the Court may award a distringas, or the party may have a fieri fac. or elegit against the sheriff to levy as much of his own, see Mich. 8 H. VIII. Reports, Crooke 187, O. N. in the Exchequer, makes the sheriff debtor to the King, and the debtor himself debtor to the sheriff. And though an action of account will lie properly in this case, yet the same case will many times bear both actions, though the money be received per auter mains, or the like.[4] * * *

(B) Statutory Obligation

WALDEN v. VEASELY.

(Court of King's Bench, 1626. Noy, 75.)

The plaintiffs being sheriffs in Coventry, &c., bring debt for £7. and 6d. for their fees for an execution of £181. So that for their fees demanded was 12d for every pound until £100. and 6d. for every pound over and above. Read the words of the statute and for the construc-

[4] The remainder of the report, discussing other questions, is omitted.

tion of it, note the proviso in the statute 28 Eliz. which does not extend to a city corporate. And note that statute is introductive of a new law; for the encouraging of officers to venture to do executions. And in that case it was resolved.

1. That the sheriff may have an action of debt for his fee, although the statute does not give any remedy. And it was so adjudg'd. 14 Jac. B. R. rot. 531. Probee and Lumbee Sheriffs of London. And so debt by a parson upon two E. VII, 6. for not setting out of tithes. And that in our case it was also ruled; that the sheriff may refuse to make execution, until his fee be paid him. But then see if a new sheriff be made, and before that the old one had made execution, what remedy now hath the party. And it seem'd to me, that he may have an account, or an action upon the case, in nature of an assumpsit.[5] * * *

And now judgment was given for the plaintiff, but now there was much doubt upon the words of the statute, and the Court divided in that point; if the sheriff shall not have but 12d. for every pound to an hundred, and after 6d., or if he shall have but 6d. for every pound when the execution is more than an hundred. Coopers Case, that a sheriff cannot take an obligation with a penalty for his fee within the statute.

ANONYMOUS.

(Court of King's Bench, 1704. 6 Mod. 26.)

HOLT, C. J. If money be devised out of lands, sure the devisee may have debt against the owner of the land for the money, upon the statute of 32 Hen. VIII, c. 1, of Wills; for wherever a statute enacts anything, or prohibits anything, for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity; and the action must be against the terre-tenant.[6]

[5] A portion of the opinion is omitted.

[6] In Shepherd v. Hills (1855) 11 Exch. 55, 65, Parke, B., said: "There is no doubt that wherever an Act of Parliament creates a duty or obligation to pay money, an action will lie for its recovery, unless the act contains some provision to the contrary."

PROPRIETORS OF THE SECOND TURNPIKE ROAD v. TAYLOR.

(Superior Court of Judicature of New Hampshire, 1834. 6 N. H. 499.)

Assumpsit to recover certain tolls, alleged to be due from the defendant, for passing over the plaintiffs' turnpike road. The defendant was going to Weathersfield, in Vermont, to purchase lumber for his own use.

The plaintiffs' charter granted them certain tolls, but "provided that nothing in this act shall extend to entitle the said corporation to demand toll of any person, who shall be passing with his horse or carriage, to or from public worship, or with his horse, team or cattle, or on foot, to or from any mill, or on the common and ordinary business of family concerns within the same town."

Toll was demanded of the defendant, which he refused to pay, on the ground that the corporation had no right to demand it.

PARKER, J.[7] The defendant does not bring his case within the proviso in the plaintiffs' charter. * * *

Nor can the objection to the form of action avail the defendant. It is well settled that assumpsit lies for tolls. 1 N. H. 20, Chesley v. Smith; 1 D. & E. 616, Seward v. Baker; 2 Wils. 95, Mayor of Exeter v. Trimlet; 3 Burr. 1402, Mayor of Yarmouth v. Eaton; 2 Greenl. (Me.) 404, Bear Camp River Co. v. Woodman; 17 Johns. (N. Y.) 33, Newburgh Turnpike v. Belknap; 2 Pick. (Mass.) 538, Medford Turnpike v. Torrey.

There was in the case no express promise to pay, but the law implies the promise, and the implication is founded upon the defendant's own act.

Nor can his refusal to pay alter the case. This is no more than saying that he was under no legal obligation to pay, and does not prevent the implication of a promise, it being found that he is legally liable to pay toll. If the right to receive tolls, and the duty to pay, had been defeated, or had never arisen, by reason of this refusal, then a promise to pay could not be implied against the express dissent of the defendant. But such is not the fact.

The right to receive the tolls arises from the use of the road by the defendant. 3 Barn. & Adolph. 411, Mayor, &c., of Newport v. Saunders. And the duty to pay is not the less imperative because the defendant himself supposed he was not liable, and refused to pay. 1 Camp. 222, Morris v. Burdett.

The implied promise arises from this right of the plaintiffs, and the duty and liability of the defendant, consequent upon his use of the road, and is not dependent upon his denial or admission of the obligation.

An individual purchasing merchandise could surely not defend

[7] The statement of facts is abridged and portions of the opinion are omitted.

against an action of assumpsit for the price, by showing that upon payment being requested, when the merchandise was delivered to him, he refused to pay. * * *

Judgment for the plaintiffs.

STEAMSHIP CO. v. JOLIFFE.

(Supreme Court of the United States, 1864. 2 Wall. 450, 17 L. Ed. 805.)

Action in the Justices' Court of California by Joliffe against the Pacific Mail Steamship Company to collect half-pilotage. The court gave judgment for $52 against the Steamship Company. This judgment was affirmed by the County Court. The Steamship Company sued out a writ of error to reverse this judgment.

FIELD, J.[8] This case arises upon the act of the State of California, of the 20th of May, 1861 (St. 1861, p. 594) entitled "An act to establish pilots and pilot regulations for the port of San Francisco." The act provides for the creation of a Board of Pilot Commissioners, and authorizes the board to license such number of pilots for the port as it may deem necessary, and prescribes their qualifications, duties, and compensation. * * * And it declares, that when a vessel is spoken by a pilot and his services are declined, he shall be entitled to one-half pilotage fees, except when the vessel is in tow of a steam-tug outward bound, in which case no charge shall be made, unless a pilot be actually employed.

On the 1st of November, 1861, the plaintiff in the court below, the defendant in error in this court, was a pilot for the port of San Francisco, having been regularly appointed and licensed by the board created under the act of the State. At that time the steamship Golden Gate was lying in the port, and about to proceed to Panama, carrying passengers and treasure. * * * To the master of this steamship the plaintiff offered his services to pilot the vessel to sea; but his services were refused, and to recover the half-pilotage fees allowed in such cases by the act of 1861, the present action was brought.

At the last term of this court, it was suggested that the constitutionality of the act in question was involved in the decision of the case; and the court thereupon reserved its consideration until the State of California could be represented. The Attorney-General of the State has accordingly appeared and filed a brief in the case. Since the action of the court in this respect, the legislature of California has passed a new statute on the subject of pilots and pilot regulations for the port of San Francisco, re-enacting substantially the provisions of the original act, but at the same time in terms repealing that act. And the first point made by the Attorney-General is, that, by reason of the repeal, the present action cannot be maintained. His position is, that as the

[8] The statement of facts and portions of the opinion are omitted.

claim to half-pilotage fees was given by the statute, the right to recover the same fell with the repeal of the statute; and that this court must dismiss the writ of error on that ground.

The claim to half-pilotage fees, it is true, was given by the statute, but only in consideration of services tendered. The object of the regulations established by the statute, was to create a body of hardy and skilful seamen, thoroughly acquainted with the harbor, to pilot vessels seeking to enter or depart from the port, and thus give security to life and property exposed to the dangers of a difficult navigation. This object would be in a great degree defeated if the selection of a pilot were left to the option of the master of the vessel, or the exertions of a pilot to reach the vessel in order to tender his services were without any remuneration. The experience of all commercial states has shown the necessity, in order to create and maintain an efficient class of pilots, of providing compensation, not only when the services tendered are accepted by the master of the vessel, but also when they are declined. If the services are accepted, a contract is created between the master or owner of the vessel and the pilot, the terms of which, it is true, are fixed by the statute; but the transaction is not less a contract on that account. If the services tendered are declined, the half fees allowed are by way of compensation for the exertions and labor made by the pilot, and the expenses and risks incurred by him in placing himself in a position to render the services, which, in the majority of cases, would be required. The transaction, in this latter case, between the pilot and the master or owners, cannot be strictly termed a contract, but it is a transaction to which the law attaches similar consequences; it is a quasi contract. The absence of assent on the part of the master or owner of the vessel does not change the case. In that large class of transactions designated in the law as implied contracts, the assent or convention which is an essential ingredient of an actual contract is often wanting. Thus, if a party obtain the money of another by mistake, it is his duty to refund it, not from any agreement on his part, but from the general obligation to do justice which rests upon all persons. In such case the party makes no promise on the subject; but the law, "consulting the interests of morality," implies one; and the liability thus arising is said to be a liability upon an implied contract. Argenti v. San Francisco, 16 Cal. 282; Maine on Ancient Law, 344. The claim for half-pilotage fees stands upon substantially similar grounds.

"There are many cases," says Mr. Justice Curtis, speaking for this court, "in which an offer to perform, accompanied by present ability to perform, is deemed by law equivalent to performance. The laws of commercial states and countries have made an offer of pilotage services one of those cases." Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 312, 13 L. Ed. 996.

The claim of the plaintiff below for half-pilotage fees, resting upon a transaction regarded by the law as a quasi contract, there is no just ground for the position that it fell with the repeal of the statute under

which the transaction was had. When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute. And such is the position of the claim of the plaintiff below in the present action: the pilotage services had been tendered by him; his claim to the compensation prescribed by the statute was then perfect, and the liability of the master or owner of the vessel had become fixed.[9] * * *

Judgment affirmed.

(C) Obligation Created by a Record

CRAWFORD v. WHITTAL.

(Court of King's Bench, 1773. 1 Doug. 4, note.)

It was an action of indebitatus assumpsit, brought by Crawford as administrator of one Hargrave, in which he declared that the defendant was indebted to him, as administrator, "in the sum of £747 sterling for 6904 rupees 10 annas and 9 pice of current money of Bengal in the East Indies, by a certain judgment of the Honourable The Mayor's Court at Calcutta, at Ft. William in Bengal aforesaid, holden before, &c., before that time, viz., on &c., adjudged and awarded to be paid by the said defendant to the said plaintiff, as administrator as aforesaid, for a certain demand of the said plaintiff, as administrator as aforesaid, sued and prosecuted in the same court of 5801 rupees, &c., together with interest due thereon from &c. till &c. at the rate of &c. being &c. current money of Bengal aforesaid, and costs of suit, being &c. making together the said sum of 6904 rupees &c., which said judgment is in force and unsatisfied; and which said 6904 rupees, &c. at the time of recovering the said judgment, were and yet, are of the value of the said £747; and being so indebted, the defendant, afterwards, in consideration of the premises, undertook to pay." There were other counts to the like effect; some of them stating the sum only in East India money, —some varying the amount,—and some stating the judgment, without adding "for a certain demand &c."

The defendant demurred specially to this declaration and shewed for cause that there was no profert of the letters of administration. It was argued, on Tuesday, the 9th of February by Fearnley for the defendant, and Mansfield for the plaintiff. Two points were made for the defendant: 1. That assigned for cause of demurrer. 2. An

[9] The majority of the court held, further: (1) That the act of 1864 did not repeal the original act of 1861; and (2) that the act of 1861 was not unconstitutional, as being in conflict with federal legislation on this subject. Miller, Wayne, and Clifford, JJ., dissented on both of these points.

objection to the substance of the declaration, viz., that the ground of the judgment abroad, and the cause of action there ought to have been shown. The cases of Duplein v. De Roven, 2 Vern. 540, and Bowles v. Bradshaw, M. 22 Geo. II, Mss. (which was indebitatus assumpsit on a judgment in the Court of Exchequer in Ireland) were cited.

As to the first point, the court said that profert of the letters of administration was unnecessary; because in this action the plaintiff had no occasion to have described himself as administrator.

Second point. ASTON, J. The declaration is sufficient; we are not to suppose it an unlawful debt.

ASHHURST, J. I have never seen this doubted; I have often known assumpsit brought on judgments in foreign courts; the judgment is a sufficient consideration to support the implied promise.

Judgment for the plaintiff.[10]

[10] Either debt or assumpsit will lie upon a judgment of a domestic court not of record, Williams v. Jones (1845) 13 Mees. & W. 627; or upon a judgment of a court of a foreign country, Mellin v. Horlich (C. C. 1887) 31 Fed. 865.

In Williams v. Jones, supra, Parke, B., said: "The principle on which this action is founded is that where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced, and the same rule applies to inferior courts in this country, and applies equally whether they be courts of record or not."

Upon a judgment of a domestic court of record assumpsit does not lie but debt only. Woods v. Pettis (1832) 4 Vt. 556. "We are sensible there are many cases where either debt or assumpsit may be brought; but when the claim is wholly founded upon a matter of record and exists only as a matter of record, the action to recover it must be debt and cannot be assumpsit."

The same is true in this country as to a judgment of a court of record of a sister state. Assumpsit does not lie, but debt only. This is by reason of the "full faith and credit" clause of the United States Constitution, article 4, sec. 1. Andrews v. Montgomery (1821) 19 Johns. (N. Y.) 162, 10 Am. Dec. 213; McKim v. Odom (1835) 12 Me. 94.

A decree of a court of equity of another state or country for the unconditional payment of a sum of money may also be enforced by action of debt. Pennington v. Gibson (1853) 16 How. 65, 14 L. Ed. 847; Mutual Life Ins. Co. of New York v. Newton (1888) 50 N. J. Law, 571, 14 Atl. 756.

As to a decree for payment of alimony, see Wagner v. Wagner (1904) 26 R. I. 27, 57 Atl. 1058, 65 L. R. A. 816, 3 Ann. Cas. 578.

See also 15 Columbia Law Review, 237 et seq.; Dubois v. Seymour (1907) 152 Fed. 600, 81 C. C. A. 590, 11 Ann. Cas. 658.

RECOGNIZANCE.—"A recognizance is defined to be 'an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like.' 2 Bl. Com. 341; 2 Tidd's Pr. 1083, Phil. Ed. 1840. It does not, like a bond, create a new debt, but is the acknowledgment of a precedent one, which, being carried into record, becomes binding and conclusive on the party. 2 Bl. Com. supra; 2 Shep. Touch. by Preston, 354, N." Beardsley, J., in People v. Kane (1847) 4 Denio (N. Y.) 530, 534. The case contains a valuable discussion of the history, nature and effect of a recognizance.

See, also, Gay v. State (1871) 7 Kan. 394; State v. McGuire (1889) 42 Minn. 27, 43 N. W. 687.

II. Obligation to Account—Unjust Enrichment [11]

ROBSERT v. ANDREWS.

(Court of Queen's Bench, 1588. Cro. Eliz. 82.)

If a person receives money by the hands of a servant for the relief of others, he may be charged as having so received it, in an action of account, tho' no agreement was made that he should account.[12] * * *

HEWER v. BARTHOLOMEW.

(Court of Queen's Bench, 1598. Cro. Eliz. 614.)

Accompt, supposing that he received £100. by the hands of John Coventry. The defendant pleaded that he did not receive anything by the hands of John Coventry to render account, etc.; and thereupon they were at issue. The jury found that Bartholomew paid that £100. to Hewer the plaintiff in redemption of a mortgage; and he commanded his servant to put it in his closet; who did so. Afterwards Bartholomew demanded of the plaintiff certain evidences and bonds; which he refused to deliver. The defendant then required, that he might have his money again, which he then had paid. The plaintiff thereupon commanded his servant, John Coventry, that he should fetch back the said £100. to redeliver to the aforesaid J. Bartholomew the said £100. by him paid; and that the said John Coventry did fetch again the said money, and poured it forth upon the table of the said J. Bartholomew with this intention, that the said J. Bartholomew should receive back in the presence of the plaintiff the £100. aforesaid, which the said J. Bartholomew to the said plaintiff had paid: and that the plaintiff then and there did will the defendant to receive the aforesaid £100. which had been paid to the said defendant by the aforesaid plaintiff which £100. said defendant then received and carried away. And thus on these facts, etc.

And All the Court resolved,[13] that this payment was a good discharge of the mortgage; and although he afterwards required it again, as his own money, yet it shall not avoid that which was absolutely paid; but the mortgage remains absolutely discharged; and the monies were

[11] "The equitable principle which lies at the foundation of the great bulk of Quasi Contracts, namely, that one person shall not unjustly enrich himself at the expense of another, has established itself very gradually in the Common Law. * * * The most fruitful manifestations of this doctrine in the early law are to be found in the action of Account." Ames, The History of Assumpsit, 2 Harvard Law Rev. 1, 53, at page 66 (3 Select Essays in Anglo-American Legal History, 259, 295.)

[12] A portion of the case is omitted.

[13] A portion of the report, printed in Latin, is here translated. Portions of the opinions, dealing with another point, are omitted.

the plaintiff's own monies. And although he delivered them to the defendant as his own, not knowing the law therein, supposing it to be no payment; yet in regard he did not give it otherwise, nor upon other consideration, the defendant received them as the plaintiff's money, and is accountable for them.

Secondly, POPHAM and GAWDY held, that this was not any receipt by the hands of J. Coventry but by the hands of plaintiff himself. * * *

FENNER held the contrary in this point. * * *

And CLENCH doubted. Et adjournatur.

But afterwards the plaintiff discontinued his suit, and brought a new action, supposing the receipt by his own hands.

EARL OF LINCOLN v. TOPCLIFF.

(Court of Queen's Bench, 1598. Cro. Eliz. 644.)

Debt upon a bill ensealed, whereby the defendant acknowledged that he had received of the plaintiff £7. ad emendum a pair of bellows, and other things to the use of the Earl; and avers, that he had not bought the things, nor paid the money. And thereupon the defendant demurred; for he objected that the plaintiff in this case ought to have had accompt and not debt.

But ALL THE JUSTICES held, that he might have either the one or the other, at his election.[14] Wherefore, without argument, it was adjudged for the plaintiff.[15]

[14] "Attempts were made at a comparatively recent period to bring debt against the receiver; but these attempts were unsuccessful. The first case in which an action of debt in such situation was allowed was in the time of Henry VIII (Y. B. 19 Hen. VIII, 3, 15), and from that time on it has been perfectly settled that the plaintiff has an option to bring either debt or account. Whenever you could have debt you could have indebitatus assumpsit, and this is the origin of the count for money had and received for the use of the plaintiff." Ames, Lectures on Legal History, 118, 119, Account.

"It is sometimes asserted that debt, and later indebitatus assumpsit, superseded account. Such an assertion rests upon a confusion of ideas; for a debt was necessary to support either of those actions, and obviously an obligation to account could not constitute a debt. Circumstances might of course arise in which the receiver had so dealt with the property (e. g. by converting it to his own use) that the obligation to account could be treated as having been converted into a debt; in such case the plaintiff would have the option of holding the receiver to account or of waiving the account and bringing debt." 4 Oxford Studies in Social & Legal History—Contract in Early English Equity, p. 15, by W. T. Barbour.

[15] In Core's Case (1573) Dyer, 20a, the plaintiff brought debt against the administrator of Gray Woddye, alleging that the said Woddye received of plaintiff £20 to buy French prunes at Rouen and ship the same to plaintiff in London, but that Woddye had not bestowed the money in prunes. Plaintiff had a verdict, and defendant alleged in arrest of judgment that debt would not lie against the testator, but only account. Held, that "it is in the election of the bailor to have an action of debt or account in such case against the testator. * * * And so it shall be reasonable that the action lies, or otherwise plaintiff will be without remedy, and defendant might retain £20. in his hands, which would be unreasonable. For it is clear law that no action of

BONNEL v. FOULKE.

(Court of King's Bench, 1657. 2 Sid. 4.)

The plaintiff being one of the colemeeters of London, for which he was to pay £80. per annum, the special matter was found to be that by divers charters the Kings of England had granted and confirmed to the Mayor and Aldermen of London the measuring of cloths as well woolen, as linen, silks, etc., and the weighing and measuring of fruit, fish, coals, etc., both in the port of London and on the river Thames from Stanes-bridge to London-bridge and from thence to Medway near the sea, as also upon the river Medway, of all such goods landed upon the banks within the said space before limited; and it was found that in ancient times but four colemeeters, and afterwards six were appointed, and afterwards eight. And in the third year of King James it was enacted by the Common Council of London (which has as much power within the walls of London as an act of Parliament without) that there should be ten colemeeters, eight of whom should pay their rent to the Lord Mayor for the time being, for the maintenance of his honorable house, and the other two to the Chamberlain of London; and the plaintiff was one of which two who should pay rent to the Chamberlain of London, as was plainly proven. And about the year 1652 (as I remember) when the defendant was Mayor, he demanded of the plaintiff said rent, which he paid quarterly, and holds several receipts to this effect: "Received of J. B. one of the colemeeters of the city of London, the sum of £20. for his rent, by me, J. F., Lord Mayor, etc." And then the rent was demanded of the said plaintiff by the Chamberlain of the city and he paid to the Chamberlain the said rent and therefore he brought assumpsit, namely indebitatus assumpsit, against the defendant, Foulke.

And ADJUDGED [16] that action well lies.

As if one comes to me and says, "Pay me my rent, I am your landlord" and I reply, "Give me your receipt and you shall have it." And so I pay him, and then another who has a right (to the rent) comes and demands it and I pay him, I can have indebitatus assumpsit against him who gave me the first receipt.

And if I pay monies in satisfaction of a duty and he to whom it is paid has no title to receive it, and so the duty is not satisfied, he to whom it is paid is indebted to me, and therefore I may maintain action against him just as well as when one who has no title demands rent. * * *

account lies against an executor or administrator, for the law does not intend them to have been privy to the account; wherefore it seemed that the judgment was good, and affirmable, and so it was adjudged."

Compare Manning v. Fallon (N. J. Sup. 1907) 66 Atl. 903.

[16] The statement of facts is abridged, and a portion of the opinion, discussing another point, is omitted. Most of the original report is in Norman French. The translation here made closely follows that found in 1 Keener's Cases on Quasi Contracts, 70.

ARRIS v. STUKELY.

(Court of Exchequer, 1677. 2 Mod. 260.)

Indebitatus assumpsit for £200. in money had and received to the use of the plaintiffs; upon non assumpsit pleaded, the jury find a special verdict to this effect, viz. that King Charles the Second did, on the 17th day of August, in the 12th year of his reign, by his letters patent under the Great Seal, grant to the defendant and another the office of comptroller of the customs at the port of Exeter durante bene placito; that the other person died; and that the king afterwards, by other letters patents bearing date the first day of May in the twenty-first year of his reign, did grant said office to the plaintiffs, which was two years before this action brought; and that the defendant still and for seven years past had exercised the same under pretense of a right by survivalship, and received the profits thereof. But whether upon the whole matter the defendant made any such promise as in the declaration, they did not know; et petunt advisamentum Curiæ in præmissis; and if upon the matter so found the Court shall be of opinion that the defendant made such promise, then they say that he did make such promise, and assess damages occasione præmissorum in narratione mentionat. ad £100. and costs to 53s. and 4d. &c.

Winnington, Solicitor General, argued, that the first patent was determined by the death of one of the patentees, and then the second patent takes effect, and so the plaintiffs have a good title; for there shall be no survivalship of an office of trust, no not if the office had been granted to two for their lives, if it be not said "to the survivor of them," 11 Co. 34, Auditor Curle's Case.

And of that opinion was THE COURT clearly.[17] * * *

Second point.—Pollexfen, for the defendant. A general indebitatus assumpsit will not lie here for want of a privity, and because there is no contract. It is only a tort, a disseisin, and the plaintiff might have brought an assise for this office, which lies at the common law; and so it hath been adjudged in Jehu Webb's Case, 8 Co. 4, which is also given by the Statute of Westminster II, cap. 25, for a profit a prendre in alieno solo. The plaintiff might have brought an action on the case against the defendant for disturbing of him in his office; and that had been good, because it had been grounded on the wrong. In this case the defendant takes the profits against the will of the plaintiff, and so there is no contract; but if he had received them by the consent of the plaintiff, yet this action would not lie for want of privity. It is true, in the case of the King, where his rents are wrongfully received, the party may be charged to give an account as bailiff; so also may the executors of his accountant, because the law creates a privity; but it is otherwise in the case of a common person, 10 Co. 114b; 11 Co.

[17] Portions of the opinion, discussing other matters, together with the arguments of counsel thereon, are omitted.

90b;[18] because in all actions of debt there must be a contract, or quasi ex contractu; and therefore where judgment was had, and thereupon an elegit, and the sheriff returned that he had appraised the goods, and extended such lands, which he delivered to the plaintiff, ubi revera he did not, per quod actio accrevit, which was an action of debt, it was adjudged, that it would not lie, because the sheriff had not returned that he meddled with the goods, or with the value of them; and therefore for want of certainty how much to charge him with, this action would not lie, but an action on the case for a false return; but if he had returned the goods sold for so much money certain which he had delivered, then an action of debt would lie; for though it is not a contract, it is quasi ex contractu, Hob. 206.

Winnington, Solicitor General, and Sawyer, contra, said, that an indebitatus assumpsit would lie here; for where one receives my rent, I may charge him as bailiff or receiver; or if any one receive my money without my order, though it is a tort, yet an indebitatus will lie, because by reason of the money the law creates a promise; and the action is not grounded on the tort, but on the receipt of the profits in this case.

THE COURT. An indebitatus assumpsit will lie for rent received by one who pretends a title; for in such case an account will lie. Wherever the plaintiff may have an account, an indebitatus will lie. * * *

And, in the Michaelmas term following, the Court gave judgment for the plaintiff.[19]

LAMINE v. DORRELL.

(Court of King's Bench, 1705. 2 Ld. Raym. 1216.)

In an indebitatus assumpsit for money received by the defendant to the use of the plaintiff as administrator of J. S. on non assumpsit pleaded, upon evidence the case appeared to be, that J. S. died intestate possessed of certain Irish debentures; and the defendant pretending to a right to be administrator, got administration granted to him, and by that means got these debentures into his hands, and disposed of

[18] See Ames' Lectures on Legal History, 120, 121, "Account."

[19] Accord: Howard v. Wood (1676) T. Jones, 126. Albright v. Sandoval (1910) 216 U. S. 331, 340, 30 Sup. Ct. 318, 320, 54 L. Ed. 502. ("The weight of authority is to the effect that a de jure officer may recover from the de facto officer the emoluments of the office, less the reasonable expenses incurred in earning such fees, when the de facto officer entered into the office in good faith and under color of title.")

Contra: Stuhr v. Curran (1882) 44 N. J. Law, 181, 43 Am. Rep. 353 (able dissenting opinion by Beasley, C. J.).

No recovery is allowed for mere gratuities received by defendant while he was usurping plaintiff's office. Boynton v. Didsworth (1796) 6 Term Rep. 681.

In Asher v. Wallis (1708) 11 Mod. 146, a man, having a wife in England, went to Jamaica and there married the plaintiff and collected the rents of her land. She afterwards discovered that he had another wife living, and sued him in indebitatus assumpsit for the rents thus collected. The court held that the action would lie.

them: then the defendant's administration was repealed, and administration granted to the plaintiff, and he brought this action against the defendant for the money he sold the debentures for. And it being objected upon the evidence, that this action would not lie, because the defendant sold the debentures as one that claimed a title and interest in them, and therefore could not be said to receive the money for the use of the plaintiff, which indeed he received to his own use; but the plaintiff ought to have brought trover or detinue for the debentures: the point was saved to the defendant, and now the court was moved, and the same objection made.

POWELL, Justice. It is clear the plaintiff might have maintained detinue or trover for the debentures; but when the act that is done is in its nature tortious, it is hard to turn that into a contract, and against the reason of assumpsits. But the plaintiff may dispense with the wrong, and suppose the sale made by his consent, and bring an action for the money they were sold for, as money received to his use. It has been carried thus far already. Howard and Wood's case [2 Lev. 245, T. Jones, 126] is as far: there the title of the office was tried in an action for the profits.

HOLT, Chief Justice. These actions have crept in by degrees. I remember, in the case of Mr. Aston, in a dispute about the title to the office of clerk of the papers in this court, there were great counsel consulted with; and Sir William Jones and Mr. Saunders were of opinion, an indebitatus assumpsit would not lie, upon meeting and conferring together, and great consideration. If two men reckon together, and one overpays the other, the proper remedy in that case is a special action for the money overpaid, or an account; and yet in that case you constantly bring an indebitatus assumpsit for money had and received to the plaintiff's use. Suppose a person pretends to be guardian in socage, and enters into the land of the infant, and takes the profits, though he is not rightful guardian, yet an action of account will lie against him. So the defendant in this case pretending to receive the money the debentures were sold for in the right of the intestate, why should he not be answerable for it to the intestate's administrator? If an action of trover should be brought by the plaintiff for these debentures after judgment in this indebitatus assumpsit, he may plead this recovery in bar of the action of trover, in the same manner, as it would have been a good plea in bar for the defendant to have pleaded to the action of trover, that he sold the debentures, and paid to the plaintiff in satisfaction. But it may be a doubt if this recovery can be pleaded before execution. This recovery may be given in evidence upon not guilty in the action of trover, because by this action the plaintiff makes and affirms the act of the defendant in the sale of the debentures to be lawful, and consequently the sale of them is no conversion.

Afterwards the last day of the term, upon motion to the court, they gave judgment for the plaintiff. And HOLT said, that he could not see

how it differed from an indebitatus assumpsit for the profits of an office by a rightful officer against a wrongful, as money had and received by the wrongful officer to the use of the rightful.

MOSES v. MACFERLAN.[20]

(Court of King's Bench, 1760. 2 Burr. 1005.)

Lord Mansfield delivered the resolution of the Court in this case; which stood for their opinion, "Whether the plaintiff could recover against the defendant, in the present form of action, (an action upon the case for money had and received to the plaintiff's use;) or whether he should be obliged to bring a special action upon the contract and agreement between them."

It was an action upon the case, brought in this Court, by the now plaintiff, Moses, against the now defendant, Macferlan, (heretofore plaintiff in the Court of Conscience, against the same Moses now plaintiff here,) for money had and received to the use of Moses the now plaintiff in this Court.

The case, as it came out upon evidence and without dispute, at nisi prius before Lord Mansfield at Guildhall, was as follows. It was clearly proved, that the now plaintiff, Moses, had indorsed to the now defendant, Macferlan, four several promissory notes made to Moses himself by one Chapman Jacob, for 30s. each, for value received, bearing date 7th November, 1758; and that this was done in order to enable the now defendant Macferlan to recover the money in his own name, against Chapman Jacob. But previous to the now plaintiff's indorsing these notes, Macferlan assured him "that such his indorsement should be of no prejudice to him:" and there was an agreement signed by Macferlan, whereby he (amongst other things) expressly agreed "that Moses should not be liable to the payment of the money, or any part of it; and that he should not be prejudiced, or be put to any costs, or any way suffer, by reason of such his indorsement." Notwithstanding which express condition and agreement, and contrary thereto, the present defendant Macferlan summoned the present plaintiff Moses into the Court of Conscience, upon each of these 4 notes, as the indorser thereof respectively, by 4 separate summonses. Whereupon Moses, (by one Smith, who attended the Court of Conscience at their second Court, as Solicitor for him and on his behalf,) tendered the said indemnity to the Court of Conscience, upon the first of the said four causes; and offered to give evidence of it and of the said agreement,

[20] "Although there are earlier cases in which obligations which would now be recognized as quasi contractual were enforced, Lord Mansfield's opinion in the case of Moses v. Macferlan, decided by the Court of King's Bench in 1760, may be said to mark the emergence of quasi contract as a distinct species of common-law obligation." Woodward, Quasi Contracts, § 2.

by way of defence for Moses in that court. But the Court of Conscience rejected this defence, and refused to receive any evidence in proof of this agreement of indemnity, thinking that they had no power to judge of it: and gave judgment against Moses, upon the mere foot of his indorsement, (which he himself did not at all dispute,) without hearing his witnesses about the agreement "that he should not be liable:" for the commissioners held this agreement to be no sufficient bar to the suit in their court; and consequently decreed for the plaintiff in that court, upon the undisputed indorsement made by Moses. This decree was actually pronounced, in only one of the 4 causes there depending: but Moses's agent, (finding the opinion of the commissioners to be as above mentioned,) paid the money into that court, upon all the four notes; and it was taken out of Court by the now defendant Macferlan, (the then plaintiff, in that court,) by order of the commissioners.

All this matter appearing upon evidence before Lord Mansfield at nisi prius at Guildhall, there was no doubt but that, upon the merits, the plaintiff was intitled to the money: and accordingly, a verdict was there found for Moses, the plaintiff in this Court, for £6. (the whole sum paid into the Court of Conscience;) but subject to the opinion of the Court, upon this question, "Whether the money could be recovered in the present form of action; or whether it must be recovered by an action brought upon the special agreement only."

THE COURT, having heard the counsel on both sides, took time to advise.

LORD MANSFIELD now delivered their unanimous opinion, in favour of the present action.

There was no doubt at the trial, but that upon the merits the plaintiff was intitled to the money: and the jury accordingly found a verdict for the £6. subject to the opinion of the Court upon this question, "Whether the money might be recovered by this form of action," or "must be by an action upon the special agreement only."

Many other objections, besides that which arose at the trial, have since been made to the propriety of this action in the present case.

The 1st objection is, "That an action of debt would not lie here; and no assumpsit will lie, where an action of debt may not be brought:" some sayings at nisi prius, reported by note-takers who did not understand the force of what was said, are quoted in support of that proposition. But there is no foundation for it.

It is much more plausible to say, "That where debt lies, an action upon the case ought not to be brought." And that was the point relied upon in Slade's Case, 4 Co. 92: but the rule then settled and followed ever since is, "That an action of assumpsit will lie in many cases where debt lies, and in many where it does not lie." A main inducement, originally, for encouraging actions of assumpsit was, "to take away the wager of law:" and that might give rise to loose expressions, as if the action was confined to cases only where that reason held.

2d Objection—"That no assumpsit lies, except upon an express or

implied contract: but here it is impossible to presume any contract to refund money which the defendant recovered by an adverse suit."

Answer. If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded in the equity of the plaintiff's case, as it were upon a contract ("quasi ex contractu,") as the Roman law expresses it. This species of assumpsit ("for money had and received to the plaintiff's use") lies in numberless instances, for money the defendant has received from a third person; which he claims title to, in opposition to the plaintiff's right; and which he had, by law, authority to receive from such third person.

3d Objection. Where money has been recovered by the judgment of a court having competent jurisdiction, the matter can never be brought over again by a new action.

Answer. It is most clear, "that the merits of a judgment can never be over-haled by an original suit, either at law or in equity." Till the judgment is set aside, or reversed, it is conclusive, as to the subject matter of it, to all intents and purposes. But the ground of this action is consistent with the judgment of the Court of Conscience: it admits the commissioners did right. They decreed upon the indorsement of the notes by the plaintiff: which indorsement is not now disputed. The ground upon which this action proceeds was no defence against that sentence. It is enough for us, that the commissioners adjudged "they had no cognizance of such collateral matter." We can not correct an error in their proceedings; and ought to suppose what is done by a final jurisdiction, to be right. But we think "the commissioners did right, in refusing to go into such collateral matter." Otherwise, by way of defence against a promissory note for 30s. they might go into agreements and transactions of a great value: and if they decreed payment of the note, their judgment might indirectly conclude the balance of a large account. The ground of this action is not, "that the judgment was wrong;" but, "that, (for a reason which the now plaintiff could not avail himself of against that judgment,) the defendant ought not in justice to keep the money." And at Guildhall, I declared very particularly, "that the merits of a question, determined by the commissioners, where they had jurisdiction, never could be brought over again, in any shape whatsoever."

Money may be recovered by a right and legal judgment; and yet the iniquity of keeping that money may be manifest, upon grounds which could not be used by way of defence against the judgment. Suppose an indorsee of a promissory note, having received payment from the drawer (or maker) of it, sues and recovers the same money from the indorser who knew nothing of such payment. Suppose a man recovers upon a policy for a ship presumed to be lost, which afterwards comes home; or upon the life of a man presumed to be dead, who afterwards appears; or upon a representation of a risque deemed to be fair, which comes out afterwards to be grossly fraudulent.

But there is no occasion to go further; for the admission "that, unquestionably, an action might be brought upon the agreement," is a decisive answer to any objection from the judgment. For it is the same thing, as to the force and validity of the judgment, and it is just equally affected by the action, whether the plaintiff brings it upon the equity of his case arising out of the agreement, that the defendant may refund the money he received; or, upon the agreement itself, that, besides refunding the money, he may pay the costs and expences the plaintiff was put to.

This brings the whole to the question saved at nisi prius, viz. "Whether the plaintiff may elect to sue by this form of action, for the money only; or must be turned round, to bring an action upon the agreement."

One great benefit, which arises to suitors from the nature of this action, is, that the plaintiff needs not state the special circumstances from which he concludes "that ex æquo et bono, the money received by the defendant, ought to be deemed as belonging to him:" he may declare generally, "that the money was received to his use;" and make out his case at the trial. This is equally beneficial to the defendant. It is the most favourable way in which he can be sued: he can be liable no further than the money he has received; and against that may go into every equitable defence upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing which shews that the plaintiff, ex æquo et bono, is not intitled to the whole of his demand, or to any part of it. If the plaintiff elects to proceed in this favourable way, it is a bar to his bringing another action upon the agreement; though he might recover more upon the agreement, than he can by this form of action. And therefore, if the question was open to be argued upon principles at large, there seems to be no reason or utility in confining the plaintiff to an action upon the special agreement only.

But the point has been long settled; and there have been many precedents: I will mention to you one only; which was very solemnly considered. It was the case of Dutch v. Warren, M. 7 G. I, C. B. An action upon the case, for money had and received to the plaintiff's use. The case was as follows—Upon the 18th of August, 1720, on payment of £262. 10s. by the plaintiff to the defendant, the defendant agreed to transfer him 5 shares in the Welsh copper mines, at the opening of the books; and for security of his so doing, gave him this note—"18th of August, 1720. I do hereby acknowledge to have received of Philip Dutch, £262. 10s. as a consideration for the purchase of 5 shares; which I do hereby promise to transfer to the said Philip Dutch as soon as the books are open; being 5 shares in the Welsh copper mines. Witness my hand, Robert Warren." The books were opened on the 22d of the said month of August; when Dutch requested Warren to transfer to him the said 5 shares; which he refused to do; and told the plaintiff "he might take his remedy." Whereupon the plaintiff brought this

action, for the consideration-money paid by him. And an objection was taken at the trial, "that this action upon the case, for money had and received to the plaintiff's use, would not lie; but that the action should have been brought for the non-performance of the contract." This objection was over-ruled by the Chief Justice; who notwithstanding left it to the consideration of the jury, Whether they would not make the price of the said stock, as it was upon the 22d of August, when it should have been delivered, the measure of the damages; which they did; and gave the plaintiff but £175. damages. And a case being made for the opinion of the Court of Common Pleas, the action was resolved to be well brought; and that the recovery was right, being not for the whole money paid, but for the damages, in not transferring the stock at the time; which was a loss to the plaintiff, and an advantage to the defendant, who was a receiver of the difference-money, to the plaintiff's use. The Court said, that the extending those actions depends on the notion of fraud. If one man takes another's money to do a thing, and refuses to do it, it is a fraud: and it is at the election of the party injured, either to affirm the agreement, by bringing an action for the non-performance of it; or to disaffirm the agreement ab initio, by reason of the fraud, and bring an action for money had and received to his use.

The damages recovered in that case, shew the liberality with which this kind of action is considered: for though the defendant received from the plaintiff £262. 10s. yet the difference-money only, of £175. was retained by him against conscience:* and therefore the plaintiff, ex æquo et bono, ought to recover no more; agreeable to the rule of the Roman law—"Quod condictio indebiti non datur ultra, quam locupletior factus est, qui accepit." If the five shares had been of much more value, yet the plaintiff could only have recovered the £262. 10s. by this form of action.

The notion of fraud holds much more strongly in the present case, than in that: for here it is express. The indorsement, which enabled the defendant to recover, was got by fraud and falsehood, for one purpose, and abused to another.

This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex æquo et bono, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or, for money fairly lost at play; because in all these cases, the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake; or upon a consideration which

*But see Wilkinson v. Ferree (1855) 24 Pa. 190, page 371, infra; Nash v. Towne (1866) 5 Wall. 689, 18 L. Ed. 527.

happens to fail; or for money got through imposition, (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.

Therefore we are all of us of opinion, That the plaintiff might elect to waive any demand upon the foot of the indemnity, for the costs he had been put to; and bring this action, to recover the £6. which the defendant got and kept from him iniquitously.

Rule—That the postea be delivered to the plaintiff.[21]

DALE v. SOLLET.

(Court of King's Bench, 1767. 4 Burr. 2133.)

This was an action for money had and received to the plaintiff's use: non assumpsit was pleaded; and issue joined.

Case—The defendant, a ship-broker, was the plaintiff's agent in suing for and recovering a sum of money for damages done to the plaintiff's ship; and did recover and receive £2,000. for the plaintiff's use; and paid him all but £40. which he retained for his labour and service therein; which the witness (Mr. Fuller) swore he thought to be a reasonable allowance. And the jury were of opinion "that the defendant ought to retain £40. as a reasonable allowance." Consequently, the plaintiff was not intitled to recover.

The plaintiff objected, at the trial, "That the defendant could not give evidence in this manner, of this labour and service; but ought to have pleaded it by way of sett-off, or at least have given notice of it as a sett-off."

A verdict was found for the plaintiff; subject to the opinion of this Court: and if the Court should be of opinion against him, then judgment to be entered as upon a nonsuit.

Accordingly, on Tuesday last, (the 10th instant,) Mr. Dunning moved on behalf of the defendant, "that judgment might be entered against the plaintiff, as upon a non-suit:" and had a rule to shew cause.

[21] "As to the authority of Moses v. Macferlan, it has always been suspected, and has lately been overruled." Per Chase, J., in O'Harra v. Hall (1800) 4 Dall. 340, Fed. Cas. No. 10,468.

"Though the principles, relating to indebitatus assumpsit, so luminously illustrated in Moses v. Macferlan, have been universally recognized, their application to that case has been generally reprobated by the bench as well as the bar." Per Peters, J., in Carter v. First Ecclesiastical Soc. of Canterbury (1820) 3 Conn. 455.

"Although the case of Moses v. Macferlan is constantly spoken of to-day as if it were overruled, the writer knows of no case in which any doctrine differing from the decision of Moses v. Macferlan has been laid down. Undoubtedly Lord Mansfield, in that case, used many expressions which would not represent the law of to-day, but they were merely obiter dicta, and should not be confused with the grounds upon which Lord Mansfield in fact rested the decision in favor of the plaintiff." Keener, Quasi Contracts, 415.

Sir Fletcher Norton, on behalf of the plaintiff, now shewed cause; and insisted that the defendant ought either to have pleaded it, or given notice of a sett-off: but that he could not take advantage of it in this manner, without either plea or notice.

Lord Mansfield had no doubt of the defendant's being at liberty to give this evidence.

This is an action for money had and received to the plaintiff's use. The plaintiff can recover no more than he is in conscience and equity intitled to: which can be no more than what remains after deducting all just allowances which the defendant has a right to retain out of the very sum demanded. This is not in the nature of a cross-demand or mutual debt: it is a charge, which makes the sum of money received for the plaintiff's use so much less.

The two other Judges concurred.

Per Cur'. Judgment for the defendant, as on a nonsuit.[22]

SECTION 2.—DISTINCTION BETWEEN CONTRACT AND QUASI CONTRACT

I. In General

BRISTOW v. EASTMAN.

(Nisi Prius, before Lord Kenyon, C. J., 1794. 1 Esp. 172.)

Assumpsit for money had and received to the use of the plaintiffs, with the usual money counts.

The case, as it appeared in evidence, was, that the defendant had been apprentice to the bankrupts before their bankruptcy; that his principle employment, while he was in their service, had been in passing the ships engaged in their trade at the customhouse, in making payments and receiving money in that employment; but that, in making out his returns to them of the monies expended on that account, he had made many very considerable overcharges, by which he had defrauded them of a very considerable sum of money, to recover back which was the object of the present action.

Mingay for the defendant rested his defence upon two points: The

[22] See Ames' Lectures on Legal History, 117, "Account."

Account Stated.—"'An account stated' is an acknowledgment of the existing condition of liability between the parties. From it the law implies a promise to pay whatever balance is thus acknowledged to be due." Chace v. Trafford (1875) 116 Mass. 529, 532, 17 Am. Rep. 171. To sustain an action upon an account stated: "It is not necessary that there should be an express promise to pay; * * * on the contrary, there is an implied promise in law on the part of him against whom the balance is found, to pay, and action is maintainable thereon." Voight v. Brooks (1897) 19 Mont. 374, 48 Pac. 549.

first was, that during the time that he had been so employed by the bankrupts he was an infant, and that therefore an action for money had and received, which was founded on a contract, could not be maintained against him. The second was, the production of a receipt in full of all demands, given by one Lempriere, who was joint assignee with Bristow the plaintiff to the bankrupts, on which the counsel relied, that having been given under knowledge of all the circumstances, it was a complete defence to the present action.

Upon the first point LORD KENYON said, that he was of opinion that infancy was no defence to the action; that infants were liable to actions ex delicto, though not ex contractu, and though the present action was in its form an action of the latter description, yet it was of the former in point of substance; that if the assignees had brought an action of trover for any part of the property embezzled, or an action grounded on the fraud, that unquestionably infancy would have been no defence; and as the object of the present action was precisely the same, that his opinion was, that the same rule of law should apply, and that infancy was no bar to the action.[23] * * *

The plaintiff had a verdict.[24]

HERTZOG v. HERTZOG.

(Supreme Court of Pennsylvania, 1857. 29 Pa. 465.)

Error to court of common pleas, Fayette county.

This suit was brought by John Hertzog to recover from the estate of his father compensation for services rendered the latter in his lifetime, and for money lent. The plaintiff was twenty-one years of age about the year 1825, but continued to reside with his father, who was a farmer, and to labour for him on the farm except one year that he was absent in Virginia, until 1842, when the plaintiff married and took his wife to his father's, where they continued for some time as he had done before. His father then put him on another farm which he owned, and some time afterwards the father and his wife moved into the same house with John, and continued to reside there until his death in 1849.

The jury found a verdict for the plaintiff of $2,203.97, and the court entered judgment thereon.

The defendant sued out a writ of error.

LOWRIE, J.[25] "Express contracts are, where the terms of the agreement are openly uttered and avowed at the time of the making; as, to deliver an ox or ten loads of timber, or to pay a stated price for cer-

[23] As to the second point Lord Kenyon ruled that the receipt signed by one of the two joint assignees in bankruptcy was not binding.

[24] Accord: Cowern v. Neild (1912) 2 Q. B. 419; Elwell v. Martin (1859) 32 Vt. 217; Shaw v. Coffin (1870) 58 Me. 254, 4 Am. Rep. 290. A dictum contra is found in Baker & Paul v. Huddleston (1873) 3 Baxt. (62 Tenn.) 1.

[25] The statement of facts is abridged and portions of the opinion are omitted.

tain goods. Implied are such as reason and justice dictate; and which, therefore, the law presumes that every man undertakes to perform. As, if I employ a person to do any business for me, or perform any work, the law implies that I undertook and contracted to pay him as much as his labour deserves. If I take up wares of a tradesman without any agreement of price, the law concludes that I contracted to pay their real value."

This is the language of Blackstone (2 Comm. 443), and it is open to some criticism. There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties, or impose such upon them. All true contracts grow out of the intentions of the parties to transactions, and are dictated only by their mutual and accordant wills. When this intention is expressed, we call the contract an express one. When it is not expressed, it may be inferred, implied, or presumed, from circumstances as really existing, and then the contract, thus ascertained, is called an implied one. The instances given by Blackstone are an illustration of this.

But it appears in another place (3 Bl. Comm. 159–166) that Blackstone introduces this thought about reason and justice dictating contracts, in order to embrace, under his definition of an implied contract, another large class of relations, which involve no intention to contract at all, though they may be treated as if they did. Thus, whenever, not our variant notions of reason and justice, but the common sense and common justice of the country, and therefore the common law or statute law, impose upon any one a duty, irrespective of contract, and allow it to be enforced by a contract remedy, he calls this a case of implied contract. Thus out of torts grows the duty of compensation, and in many cases the tort may be waived, and the action brought in assumpsit.

It is quite apparent, therefore, that radically different relations are classified under the same term, and this must often give rise to indistinctness of thought. And this was not at all necessary; for we have another well-authorized technical term exactly adapted to the office of making the true distinction. The latter class are merely constructive contracts, while the former are truly implied ones. In one case the contract is mere fiction, a form imposed in order to adapt the case to a given remedy; in the other it is a fact legitimately inferred. In one, the intention is disregarded; in the other, it is ascertained and enforced. In one, the duty defines the contract; in the other, the contract defines the duty.

We have, therefore, in law three classes of relations called contracts:

1. Constructive contracts, which are fictions of law adapted to enforce legal duties by actions of contract, where no proper contract exists, express or implied.

2. Implied contracts, which arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract.

3. Express contracts, already sufficiently distinguished.

In the present case there is no pretence of a constructive contract, but only of a proper one, either express or implied. And it is scarcely insisted that the law would imply one in such a case as this; yet we may present the principle of the case the more clearly, by showing why it is not one of implied contract.

The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties.

Thus if a man is found to have done work for another, and there appears no known relation between them that accounts for such service, the law presumes a contract of hiring. But if a man's house takes fire, the law does not presume or imply a contract to pay his neighbors for their services in saving his property. The common principles of human conduct mark self-interest as the motive of action in the one case, and kindness in the other; and therefore, by common custom, compensation is mutually counted on in one case, and in the other not. * * *

Every induction, inference, implication, or presumption in reasoning of any kind is a logical conclusion derived from, and demanded by, certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them, a contract is proved; if not, not. If we find, as ascertained circumstances, that a stranger has been in the employment of another, we immediately infer a contract of hiring, because the principles of individuality and self-interest, common to human nature, and therefore the customs of society, require this inference.

But if we find a son in the employment of his father, we do not infer a contract of hiring, because the principle of family affection is sufficient to account for the family association, and does not demand the inference of a contract. And besides this, the position of a son in a family is always esteemed better than that of a hired servant, and it is very rare for sons remaining in their father's family, even after they arrive at age, to become mere hired servants. If they do not go to work or business on their own account, it is generally because they perceive no sufficient inducement to sever the family bond, and very often because they lack the energy and independence necessary for such a course; and very seldom because their father desires to use them as hired servants. Customarily no charges are made for boarding and clothing and pocket money on one side, or for work on the other; but all is placed to the account of filial and parental duty and relationship.

Judging from the somewhat discordant testimony in the present case, this son remained in the employment of his father until he was about forty years old; for we take no account of his temporary absence. While living with his father, in 1842, he got married, and brought his wife to live with him in the house of his parents. Afterwards his father placed him on another farm of the father, and very

soon followed him there, and they all lived together until the father's death in 1849 The farm was the father's, and it was managed by him and in his name, and the son worked on it under him. No accounts were kept between them, and the presumption is that the son and his family obtained their entire living from the father while they were residing with him.

Does the law, under the circumstances, presume that the parties mutually intended to be bound, as by contract, for the service and compensation of the son and his wife? It is not pretended that it does. But it is insisted that there are other circumstances besides these, which, taken together, are evidence of an express contract for compensation in some form, and we are to examine this.[26] * * *

Judgment reversed, and a new trial awarded.[27]

SCEVA v. TRUE.

(Supreme Judicial Court of New Hampshire, 1873. 53 N. H. 627.)

Assumpsit for the value of the support furnished by the plaintiff's intestate, Enoch F. Sceva, to Fanny True, his sister-in-law, who was and for more than a quarter of a century had been, so hopelessly insane as to have no reason or understanding.

Prior to his death, August 11, 1822, William True, father of said Fanny and her sister Martha, wife of said intestate, owned a farm in Andover and Hill, with a house, barn, and outbuildings thereon, situate in said Andover.

[26] The court concluded that there was no evidence of an express contract.

[27] "From the foregoing we have these verities: (a) Appellant was requested on behalf of respondent to perform for it services. (b) He complied with such request, continuing his labor till the task assigned to him was ended. (c) His services were very valuable to the respondent. From such circumstances there arises, as matter of law, a presumption of fact that the services were performed under contractual relations. It is a mistake in the technical sense to speak of the contract as one implied by law. There are such contracts. They arise where there is a legal duty to respond in money which by a legal fiction may be enforced as upon an implied promise. In such case there is no element of contract strictly so called. There is only the duty to which the law fixes a legal obligation of performance as in case of a promise inter partes. So it is called in the books a quasi contract. There are implied contracts in the strict sense of the term. In this case we are dealing with the subject of implied contracts in such sense. Such a contract requires, the same as an express contract, the element of mutual meeting of minds and of the intention to contract. The two species differ only in methods of proof. One is established by proof of expression of intention, the other by proof of circumstances from which the intention is implied as matter of fact." Per Marshall, J., in Wojahn v. National Union Bank of Oshkosh (1911) 144 Wis. 646, 666, 129 N. W. 1068.

The distinction between contract and quasi contract is well stated in Columbus, H. V. & T. Ry. Co. v. Gaffney (1901) 65 Ohio St. 104, 113, 61 N. E. 152, and in Board of Highway Commissioners v. City of Bloomington (1912) 253 Ill. 164, 170, 97 N. E. 280, Ann. Cas. 1913A, 471. See, also, 2 California Law Review, 171.

On May 25, 1822, in expectation of his death, said William True made the following disposition of his property: He gave, by an instrument in writing under seal, all his personal property, upon certain conditions and subject to certain charges, to his widow, Betsey True, who died upon said premises in May, 1844, without remarrying. He also gave her on the same day, in the same way, "the use and occupation of said real estate, both of lands, buildings, and tenements, so long as she, the said Betsey, remains my widow." He also, by deed, conveyed on the same day one undivided half of all said real estate to each of said daughters.

Said intestate carried on said premises in 1822, and married said Martha in December, 1823, and lived on said premises till about one month before his death. All the parties, save Fanny, treated said deeds and instruments as valid, and supposed they were valid; and, aside from the time that the said defendant was away in insane asylums and infirmaries for treatment, all lived together on said premises in one family till they died, or until said Enoch F. Sceva refused to support said Fanny longer; and she was taken away about said November 1st, and when said Enoch F. Sceva left, the month prior to his death. Said Sceva took the entire charge of the premises, used the crops and the proceeds of the lumber, wood, and bark, sold off of the whole farm for the common benefit of the family, and paid the taxes and other bills for the support and maintenance of the family.

No administration was ever had upon any part of the estate of said William True, nor was there any use or trust for the benefit of said Fanny. No attempt was ever made to make any contract with said Fanny about her support, or anything else. No application was made for the appointment of a guardian in the interest of said Enoch F. Sceva, because of the opposition of his wife to any step looking to that end. She has been supported during said forty years by said Sceva, his wife, and her mother, out of the avails of said real estate taken as aforesaid, and out of their own funds. Since 1844 her chief support has been from said Sceva. Said intestate was worth nothing when he commenced on said farm, and died worth about $1,600.

The defendant moved to dismiss. For the purpose of raising questions of law, and no other, the parties agreed that the facts are as stated above, and the questions were reserved for the whole court.

LADD, J.[28] * * * We regard it as well settled by the cases referred to in the briefs of counsel, many of which have been commented on at length by Mr. Shirley for the defendant, that an insane person, an idiot, or a person utterly bereft of all sense and reason by the sudden stroke of accident or disease, may be held liable, in assumpsit, for necessaries furnished to him in good faith while in that unfortunate and helpless condition. And the reasons upon which this rests are too broad, as well as too sensible and humane, to be overborne by any

[28] The statement of facts is abridged and a portion of the opinion, discussing a point of practice, is omitted.

deductions which a refined logic may make from the circumstance that in such cases there can be no contract or promise in fact,—no meeting of the minds of the parties. The cases put it on the ground of an implied contract; and by this is not meant, as the defendant's counsel seems to suppose, an actual contract,—that is, an actual meeting of the minds of the parties, an actual, mutual understanding, to be inferred from language, acts, and circumstances, by the jury,—but a contract and promise, said to be implied by the law, where, in point of fact, there was no contract, no mutual understanding, and so no promise. The defendant's counsel says it is usurpation for the court to hold, as matter of law, that there is a contract and a promise, when all the evidence in the case shows that there was not a contract, nor the semblance of one. It is doubtless a legal fiction, invented and used for the sake of the remedy. If it was originally usurpation, certainly it has now become very inveterate, and firmly fixed in the body of the law.

Suppose a man steals my horse and afterwards sells it for cash. The law says I may waive the tort, and recover the money received for the animal of him in an action of assumpsit. Why? Because the law, in order to protect my legal right to have the money, and enforce against the thief his legal duty to hand it over to me, implies a promise—that is, feigns a promise when there is none—to support the assumpsit. In order to recover, I have only to show that the defendant, without right, sold my horse for cash, which he still retains. Where are the circumstances, the language or conduct of the parties from which a meeting of their minds is to be inferred, or implied, or imagined, or in any way found by the jury? The defendant never had any other purpose but to get the money for the horse and make off with it. The owner of the horse had no intention to sell it, never assented to the sale, and only seeks to recover the money obtained for it to save himself from total loss. The defendant, in such a case, may have the physical capacity to promise to pay over to the owner the money which he means to steal; but the mental and moral capacity is wanting, and to all practical intents the capacity to promise according to his duty may be said to be entirely wanting, as in the case of an idiot or lunatic. At all events, he does not do it. He struggles to get away with the money, and resists with a determination never to pay if he can help it. Yet the law implies, and against his utmost resistance forces into his mouth a promise to pay. So, where a brutal husband, without cause or provocation, but from wanton cruelty or caprice, drives his wife from his house with no means of subsistence, and warns the tradesmen not to trust her on his account, thus expressly revoking all authority she may be supposed to have, as his agent, by virtue of the marital relation, courts of high authority have held that a promise to pay for necessaries furnished her while in this situation, in good faith, is implied by law against the husband, resting upon and arising out of his legal obligation to furnish her support. See remark

of Sargent, J., in Ray v. Adden, 50 N. H. 83, 9 Am. Rep. 175, and authorities cited.

So, it was held that the law will imply a promise to pay toll for passing upon a turnpike road, notwithstanding the defendant, at the time of passing, denied his liability and refused payment. Proprietors v. Taylor, 6 N. H. 499. In the recent English case of Railway Co. v. Swaffield, L. R. 6 Exch. 132, the defendant sent a horse by the plaintiffs' railway directed to himself at S. station. On the arrival of the horse at S. station, at night, there was no one to meet it, and the plaintiffs, having no accommodation at the station, sent the horse to a livery stable. The defendant's servant soon after arrived and demanded the horse. He was referred to the livery stable keeper, who refused to deliver the horse except on payment of charges which were admitted to be reasonable. On the next day the defendant came and demanded the horse, and the station master offered to pay the charges and let the defendant take away the horse; but the defendant declined, and went away without the horse, which remained at the livery stable. The plaintiffs afterwards offered to deliver the horse to the defendant at S. without payment of any charges, but the defendant refused to receive it unless delivered at his farm, and with payment of a sum of money for his expenses and loss of time. Some months after, the plaintiffs paid the livery stable keeper his charges, and sent the horse to the defendant, who received it; and it was held that the defendant was liable, upon the ground of a contract implied by law, to the plaintiffs for the livery charges thus paid by them.

Illustrations might be multiplied, but enough has been said to show that when a contract or promise implied by law is spoken of, a very different thing is meant from a contract in fact, whether express or tacit. The evidence of an actual contract is generally to be found either in some writing made by the parties, or in verbal communications which passed between them, or in their acts and conduct considered in the light of the circumstances of each particular case. A contract implied by law, on the contrary, rests upon no evidence. It has no actual existence; it is simply a mythical creation of the law. The law says it shall be taken that there was a promise, when, in point of fact, there was none. Of course this is not good logic, for the obvious and sufficient reason that it is not true. It is a legal fiction, resting wholly for its support on a plain legal obligation, and a plain legal right. If it were true, it would not be a fiction. There is a class of legal rights, with their correlative legal duties, analogous to the obligationes quasi ex contractu of the civil law, which seems to lie in the region between contracts on the one hand and torts on the other, and to call for the application of a remedy not strictly furnished either by actions ex contractu, or actions ex delicto. The common law supplies no action of duty, as it does of assumpsit and trespass; and hence the somewhat awkward contrivance of this fiction to apply the remedy of assumpsit where there is no true contract, and no promise to support it.

All confusion in this matter might be avoided, as it seems to me, by a suitable discrimination in the use of the term "implied contract." In the discussion of any subject there is always danger of spending breath and strength about mere words, as well as of falling into error when the same term is used to designate two different things. If the term "implied contract" be used indifferently to denote (1) the fictitious creation of the law spoken of above; (2) a true or actual but tacit contract, —that is, one where a meeting of the minds or mutual understanding is inferred as matter of fact from circumstances, no words, written or verbal, having been used; and (3) that state of things where one is estopped by his conduct to deny a contract, although, in fact, he has not made or intended to make one,—it is not strange that confusion should result, and disputes arise, where there is no difference of opinion as to the substance of the matter in controversy; whereas, were a different term applied to each,—as, for example, that of legal duty to designate the first; contract, simply, to designate the second; and contract by estoppel, the third,—this difficulty would be avoided. It would of course come to the same thing, in substance, if the first were always called an implied contract, while the other two were otherwise designated in such way as to show distinctly what is meant. This is not always done, and an examination of our own cases would perhaps show that more or less confusion has arisen from such indiscriminate use of the term. A better nomenclature is desirable. But whatever terms are employed, it is indispensable that the distinction, which is one of substance, should be kept clearly in mind, in order that the principles governing in one class of cases may not be erroneously applied to another. See remarks of Smith, J., in Bixby v. Moor, 51 N. H. 402, and authorities cited at page 404.

Much may doubtless be said against supplying a remedy for the enforcement of a plain legal right "by so rude a device as a legal fiction." Maine's Ancient Law, 26. But at this time of day that is a matter for the consideration of the legislature rather than the courts. The remedy of indebitatus assumpsit can hardly be abolished in that large class of cases where it can only be sustained by resorting to a fiction until some other is furnished to take its place.

It by no means follows that this plaintiff is entitled to recover. In the first place, it must appear that the necessaries furnished to the defendant were furnished in good faith, and with no purpose to take advantage of her unfortunate situation. And upon this question the great length of time which was allowed to pass without procuring the appointment of a guardian for her is a fact to which the jury would undoubtedly attach much weight. Its significance and importance must, of course, depend very much on the circumstances under which the delay and omission occurred, all of which will be for the jury to consider upon the question whether everything was done in good faith towards the defendant, and with an expectation on the part of the plaintiff's intestate that he was to be paid.

Again, the jury are to consider whether the support for which the plaintiff now seeks to recover was not furnished as a gratuity, with no expectation or intention that it should be paid for, except so far as compensation might be derived from the use of the defendant's share of the farm. And upon this point the relationship existing between the parties, the length of time the defendant was there in the family without any move on the part of Enoch F. Sceva to charge her or her estate, the absence (if such is the fact) of an account kept by him wherein she was charged with her support and credited for the use and occupation of the land,—in short, all the facts and circumstances of her residence with the family that tend to show the intention or expectation of Enoch F. Sceva with respect to being paid for her support,—are for the jury. Munger v. Munger, 33 N. H. 581; Seavey v. Seavey, 37 N. H. 125; Bundy v. Hyde, 50 N. H. 116. If these services were rendered, and this support furnished, with no expectation on the part of Enoch F. Sceva that he was to charge or be paid therefor, this suit cannot be maintained; for then it must be regarded substantially in the light of a gift actually accepted and appropriated by the defendant, without reference to her capacity to make a contract, or even to signify her acceptance by any mental assent.

In this view, the facts stated in the case will be evidence for the jury to consider upon the trial; but they do not present any question of law upon which the rights of the parties can be determined by the court. Case discharged.[29]

[29] In re Rhodes (1890) 44 Ch. Div. 94. Per Cotton, L. J.: "The case raises several questions, one of which is of considerable importance; and, although in the view which we take, that question is not necessary to the decision of the case, yet, as it has been fully argued, we think we ought to express our opinion upon it. That question is, whether there can be an implied contract on the part of a lunatic not so found by inquisition to repay out of her property sums expended for necessaries supplied to her. Now the term 'implied contract' is a most unfortunate expression, because there cannot be a contract by a lunatic. But whenever necessaries are supplied to a person who by reason of disability cannot himself contract, the law implies an obligation on the part of such person to pay for such necessaries out of his own property. It is asked, can there be an implied contract by a person who cannot himself contract in express terms? The answer is, that what the law implies on the part of such person is an obligation, which has been improperly termed a contract, to repay money spent in supplying necessaries. I think that the expression 'implied contract' is erroneous and very unfortunate."

INFANT'S LIABILITY FOR NECESSARIES.—"The obligation of an infant to pay for necessaries actually furnished to him does not seem to arise out of a contract in the legal sense of that term, but out of a transaction of a quasi contractual nature; for it may be imposed on an infant too young to understand the nature of a contract at all. Hyman v. Cain (1855) 48 N. C. 111. And where an infant agrees to pay a stipulated price for such necessaries, the party furnishing them recovers, not necessarily that price, but only the fair and reasonable value of the necessaries. Earle v. Reed (1845) 10 Metc. (Mass.) 387; Barnes v. Barnes (1883) 50 Conn. 572; Trainer v. Trumbull (1886) 141 Mass. 527, 6 N. E. 761; Keener's Quasi Contracts, p. 20. This being so, no binding obligation to pay for necessaries can arise until they have been supplied to the infant; and he cannot make a binding executory agreement to purchase necessaries." Gregory v. Lee (1894) 64 Conn. 407, 30 Atl. 53, 25 L. R. A. 618, per Torrance, J.

II. Construction of Statutes

(A) The Statute of Limitations

JONES v. POPE.

(Court of King's Bench, 1667. 1 Wm. Saund. 37.)

Debt on escape.—The plaintiff declares that he, on the 14th of June, 1654, prosecuted, out of the then court of the upper bench, a writ of testatum capias ad satisfaciendum, against one Fabian Hill, directed to the sheriffs of the city of Bristol, whereby the sheriffs were commanded that they should take the said Fabian Hill, to have his body before the late pretended Protector Oliver, &c., in the upper bench at Westminster, on Saturday next after one month of St. Michael, to satisfy the plaintiff of £1000 debt and £7 6d. costs, by force of which writ the defendant and one Thomas Bull, then sheriffs of the said city, afterwards, to wit, on the 10th of August, in the year abovesaid, within the same city, took the said Fabian Hill in execution for the debt and costs aforesaid, and had him in their custody until afterwards, to wit, on the first of September, in the year 1654 aforesaid, the said now defendant and the said Bull, being then sheriffs, let the said Hill at large, and suffered him to escape, the plaintiff not being satisfied his debt and costs, and that afterwards Bull died, whereby an action accrued to the plaintiff to demand and have his debt of the defendant, being the surviving sheriff, yet the said, &c. The defendant pleads in bar, that the plaintiff's bill was exhibited against him on the 21st of November, in the 17th year of the reign of the now king, and that since the cause of action accrued, six years and more were elapsed before the day of the exhibiting the said bill. And this, &c. Wherefore, &c. Upon which plea the plaintiff demurred in law.

And Jones, of counsel with the plaintiff, argued against the plea, that an action of debt for an escape is not within the statute of limitations of 21 Jac. 1. c. 16. For the words of the statute are: "All actions of debt, grounded upon any lending, or contract, without specialty, all actions of debt for arrearages of rent, shall be brought within six years," &c. But he said, that an action of debt on an escape is not within the statute, for two reasons. First, because the action is not founded upon any lending or contract; and the statute does not limit all actions of debt generally, but only actions of debt founded upon a lending or contract without specialty; and this is a debt created by the law without any lending or contract, and therefore is not limited or restrained by the statute. Secondly, he said, that the action of debt on an escape is founded upon a specialty, namely, upon statute law, and so out of the statute of limitations. For at common law no action of debt lay against a gaoler for an escape out of execution, but only an

action upon the case, as appears in 2 Inst. 382. Then the statute of 1 Ric. II, c. 12, gives to creditors an action of debt against the warden of the Fleet upon an escape out of execution, and the statute by construction extends to all other gaolers and sheriffs. And so the statute is a specialty, upon which the action is founded; and therefore it is clearly out of the words and intention of the statute of limitations, which only limits actions of debt without specialty. And he further said, that although the words of the statute of limitations are general, as to the limitation of all actions of debt for arrearages of rent, yet it had been adjudged that an action of debt for the arrearages of rent reserved by indenture was not within the intention of the said statute. Hutton's Rep. 109, Freeman and Stacie's Case. And so, he said, it had been adjudged upon the statute of 2 & 3 Ed. VI, c. 13, of tithes, that an action brought upon that statute was not within the statute of limitations, because it was founded upon a specialty, namely, the act of Edw. VI. Cro. Car. 513, 15 Car. I, Talory and Jackson's Case. And therefore he concluded the plea was bad.

Saunders è contrà. And that the plea was good. And he said that the action of debt upon an escape was within the statute of limitations, because, although it is not founded upon a lending or contract properly, yet the law has made a contract, and the statute intends to limit all actions of debt founded upon a contract without specialty, and has not distinguished between contracts in law and in fact, but includes all. And he further said, that the action is not only founded upon the statute of 1 Ric. II, but upon the escape, which is a naked matter of fact: for though the statute and also the judgment and writ of execution are of record, and so specialties, yet the escape, upon which the action is founded, is a mere matter of fact. For if the action were founded upon a record, the defendant could not plead nil debet; for this is no plea to a specialty; but without doubt the defendant can plead nil debet. And so it seemed to him that the plea was good.

But for the reasons of Jones, THE COURT held the plea bad, and that the action was not within the statute of limitations.[30]

Then Saunders moved an exception to the declaration, that the plaintiff has only shewn that he had sued a writ of execution, by which Hill was taken, and escaped; but he has not shewn that the plaintiff had recovered any judgment, as he ought: because the defendant might have pleaded nul tiel record to the judgment, if the plaintiff had set it out, as appears in Doctor Drury's Case, 8 Rep. 142, but by this declaration the defendant is ousted of such a plea.† * * *

[30] Accord: Hodsden v. Harridge (1670) 2 William Saunders, 64. (Debt on an award is not within the statute of limitations of 21 Jac. I. c. 16. The obligation is not "founded upon any lending or contract," but it is "a debt ex quasi contractu, as the civilians term it, for which the law gives an action of debt, although there is no contract between the parties.") See, also, Wickersham v. Lee, No. 2 (1877) 83 Pa. 422.

† A portion of defendant's argument to this point is omitted.

And of such opinion was ALL THE COURT. But then the plaintiff prayed to discontinue his action, which was granted to him upon payment of costs, &c.

JORDAN v. ROBINSON.

(Supreme Judicial Court of Maine, 1838. 15 Me. 167.)

WESTON, C. J. This is an action of debt on a judgment of the Supreme Court of Judicature of the British Province of New Brunswick, rendered in 1818; with a profert of an exemplification of the judgment, which forms the basis of the action. The defendant has pleaded the general issue, and filed a brief statement, relying upon the statute of limitations.

Whatever objection may be made to the conclusive character of the judgment, by the practice and course of decisions in this country, there can be no question, but the judgment is prima facie evidence of the debt, sought to be recovered. No evidence or suggestion, impeaching the original validity of the judgment, has been offered by the defendant. Whether barred or not, therefore, must depend upon the statute of limitations. If it is an action of debt, grounded upon any lending or contract, without specialty, it is within the statute, unless excluded from its operation, by an exception, which will be noticed hereafter. The statute does not apply to all actions of debt, without specialty, but to such as are grounded upon any lending or contract. Our statute does in this respect conform to the English statute of the twentieth of Charles the Second. And the English statute has been construed to apply to a lending or contract, actually and expressly made, and not to contracts, raised by implication of law. Hodsden v. Harridge, 2 Saunders, 64. The generality of the limitation was there held to be qualified by the words, "grounded upon any lending or contract," to the exclusion of such, as the law might raise or imply.

The obligation of a debt on judgment, does not arise from any express contract, made by the party, charged by it. Judicium redditur in invitum. Upon a refined and artificial view of the obligations, imposed by law upon every individual, they may be resolved into a contract, which he makes with society to obey the laws, by which he is protected. And the force of legal obligation, has, by some elementary writers, been attempted to be strengthened upon this principle. 3 Bl. Com. 160. But contracts of this description are not barred by this part of the statute; otherwise the qualifying words would be without effect or operation; for all actions of debt are founded upon contracts, expressed or implied, in this broad sense of the term. Upon this view of the statute, which in Pennsylvania corresponds with our own, the Supreme Court of that State, in Richards v. Bickley, 13 Serg. & R. (Pa.) 395, were of opinion, that debt on a foreign judgment was not

barred by the statute, at least unless it appeared to be based upon a lending or contract, without specialty. And as the foreign judgment was there rendered upon a specialty, it was held not to be a case within the statute.

It was understood for some time, that debt could not be brought upon a foreign judgment; and that assumpsit alone was the proper remedy. Thus Buller, J., in Walker v. Witter, Doug. 1, says, "that we meet with no instance in the books of an action of debt, brought on a foreign judgment." That was the first instance in which the action had been sustained. And the bar may attach, when that form of action is resorted to, when it would not attach upon an action of debt. Some of the cases may be reconciled with each other, upon this distinction.

We are satisfied, that if we look to the judgment alone, as the basis of the action, without regard to the consideration, upon which it is founded, the obligation thence arising is not a debt, grounded upon any lending or contract, within the meaning of the statute. And if we look to the consideration of the judgment, we find it founded upon an express contract, but upon one excepted from the operation of the statute, being rendered upon a note in writing, for the payment of money, attested by a witness. The default is accordingly to stand; and judgment is to be rendered thereon.[31]

[31] Pease v. Howard (1817) 14 Johns. (N. Y.) 479, was an action of debt on a domestic judgment of a court not of record. The court, construing a statute barring within six years "all actions of debt, * * * founded upon any contract without specialty," speaking through Van Ness, J., said: "The settled construction of the statute is that it applies solely to actions of debt founded upon contracts in fact, as distinguished from those arising by construction of law. It has been held that debt upon a recovery in trover or trespass in the county court or court baron, and in various other inferior tribunals in England, is not founded upon any contract in fact between the parties, and therefore, not barred by the statutes. 2 Saund. 64, 65, etc. (1671), in notes and cases there cited. Such, too, is the case of an action of debt founded upon a statute; for which this reason is given, that a statute is a specialty. 1 Saund. 36, 37 (1667), in notes."

See, also, Barber v. International Co. (1902) 74 Conn. 652, 656, 51 Atl. 857, 92 Am. St. Rep. 246.

For opposing views as to whether a judgment is within that provision of the statute of limitations which provides for the revival of a barred debt by acknowledgment or part payment, see Olson v. Dahl (1906) 99 Minn. 433, 109 N. W. 1001, 8 L. R. A. (N. S.) 444, 116 Am. St. Rep. 435, 9 Ann. Cas. 252, and Spilde v. Johnson (1906) 132 Iowa, 484, 109 N. W. 1023, 8 L. R. A. (N. S.) 439 (with note of the authorities) 119 Am. St. Rep. 578.

Modern statutes of limitation usually contain special provisions governing actions on judgment. See 2 Black on Judgments, § 985; 23 Cyc. 1508.

In Bree v. Holbrech (1781) 2 Douglas, 654, it was held that an action of assumpsit to recover money paid by mistake was barred in six years by the provision in the statute of limitation (21 Jac. I, § 3) referring to "all actions * * * upon the case, * * * all actions of debt upon any lending or contract without specialty."

In Wilson v. Towle (1848) 19 N. H. 244, it was held that an action of debt to recover an equitable rent charge was not within the identical provision of the New Hampshire statute of limitations. It should be noted, however, that

(B) Statutes Regulating Procedure

TAYLOR v. ROOT.

(Court of Appeals of New York, 1868. 4 Keyes, 335.)

Appeal from judgment of the Supreme Court in the General Term for the First District, affirming judgment on the report of a referee.

Action by plaintiffs against defendants for an accounting. The defendants pleaded as a set-off to the claim of the plaintiff Hartshorne a judgment for $280.18 against Hartshorne in an action of slander obtained by the defendant R. C. Root, which judgment had been assigned by said Root to all the defendants in this action before this action was commenced. The action was tried before a referee, who ruled that defendants were not entitled to set off said judgment, and decided in favor of plaintiff on the principal cause of action.

WOODRUFF, J.[32] 1. The agreement, set forth in the complaint herein as the foundation of the action, required the defendants to divide the net proceeds of the publication of the New York Register, etc., into five parts. Two of these parts the defendants were to retain to themselves, and one of the remaining three parts they were to pay to each of the plaintiffs.

The plaintiffs were entitled to an accounting. * * *

2. If, then, the claim of the defendants against the plaintiff, Hartshorne, was one which, within the provisions of the Code, was a proper subject of counterclaim, the referee erred in rejecting it, when he should have allowed it against the one-fifth of the proceeds which the defendants had agreed to pay to Hartshorne.

The claim was a judgment against the plaintiff, Hartshorne, recovered, assigned to and held by the defendants before the commencement of this action.

The Code of Procedure, in declaring what may be allowed as a counterclaim, provides, that a defendant may set up, "in an action on contract, any other cause of action arising also on contract, and existing at the commencement of the action."

It appears by the case, that the referee rejected the defendants' claim, on the ground that the judgment held by them against Hartshorne, was recovered in an action "founded not on contract but on

by the usual rule in this country such an equitable rent charge is considered to be a contract implied in fact. See cases cited in note, 8 L. R. A. (N. S.) 393.

See, also, McClaine v. Rankin (1905) 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500 (stated briefly in note, page 48, infra).

Under a statute of limitations barring at the expiration of six years an action "upon a contract, obligation, or liability, express or implied," it was held in Roberts v. Ely (1889) 113 N. Y. 128, 20 N. E. 606, that a claim for money had and received against one who had insured goods for plaintiff's benefit, and who refused to account to plaintiff for the money collected under such insurance, was barred.

[32] The facts are restated and a portion of the opinion is omitted.

tort, being for slanderous words spoken by the said Hartshorne" of and concerning the plaintiff therein.

This was erroneous. The nature of the action wherein the judgment was recovered and the cause thereof were wholly immaterial, and in no manner affected the right of counterclaim; the error of the referee either proceeded upon a misapprehension of the meaning of the Code, above cited, or it overlooked the elementary definitions in the law of contracts.

Contracts are of three kinds: simple contracts, contracts by specialty, and contracts of record. A judgment is a contract of the highest nature known to the law. Actions upon judgment are actions on contract. See Blackstone, Chitty, Addison, Story, Parsons, or any other elementary writer on Contracts. The cause or consideration of the judgment is of no possible importance; that is merged in the judgment. When recovered, the judgment stands as a conclusive declaration that the plaintiff therein is entitled to the sum of money recovered. No matter what may have been the original cause of action, the judgment forever settles the plaintiff's claim and the defendant's assent thereto; this assent may have been reluctant, but in law it is an assent, and the defendant is estopped by the judgment to dissent. Forever thereafter, any claim on the judgment is setting up a cause of action on contract. It is strictly an action ex contractu, if suit is brought thereon; it is no less ex contractu when set up as a counter claim.

For this error of the referee the judgment must be reversed, and a new trial ordered that the counter claim may be allowed.

Ordered accordingly.[33]

MOORE v. NOWELL.

(Supreme Court of North Carolina, 1886. 94 N. C. 265.)

Plaintiff brought action in his own name upon several judgments obtained by one Davis against the defendants, the plaintiff alleging that he was an assignee for value of said judgments. The defendant Upchurch demurred to the complaint on the following grounds:

1. That the judgments on which the plaintiff brings his action are not negotiable or assignable in law, so as to give the plaintiff a right of action at law in his own name thereon.

2. That the plaintiff is not a party to the judgments on which his action is brought, and was not a party to the action in which the said judgments were rendered by the justice of the peace, and has no legal right to sue on the said judgment in his own name. * * *

[33] Contra: Woods v. Ayres (1878) 39 Mich. 345, 33 Am. Rep. 396. (Statutory duty to make compensation for breaking a jam of logs. Held not within a statute allowing set-off of "mutual demands arising upon judgment or upon contract express or implied"—an able opinion by Graves, J.)

The overwhelming weight of authority is in accord with the principal case. Pomeroy, Code Remedies (4th Ed.) §§ 675, 677.

His honor overruled the demurrer, and gave judgment final against the defendant Upchurch, from which he appealed.

MERRIMON, J.[34] Judgments, whether they be granted by a justice of the peace, or a court of record, are assignable either in writing or by merely verbal transfer, so as to pass the equitable title to them to the purchaser. Winberry v. Koonce, 83 N. C. 351.

The judgments mentioned and described in the complaint, were assigned to the plaintiff in writing, for value, and he became the complete equitable owner of them and the "real party in interest." The person in whose name they were taken, has only the naked legal title to them, and he holds that for the plaintiff.

It is insisted, however, that the statute, (The Code, § 177,) provides that, "Every action must be prosecuted in the name of the real party in interest, except as otherwise provided, but this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract," and that the judgments are things in action not arising "out of contract."

We cannot concur in this view. Judgments are, it is true, not ordinarily and always and for all purposes treated as contracts, as was decided, in McDonald v. Dickson, 87 N. C. 404; but in the sense of distinguishing them from causes of action arising ex delicto, they are contracts, and are classed in the law as contracts of record, and of the highest dignity. They possess the quality of engagement, by implication and force of the law, on the part of the judgment debtor, to pay the sum of money adjudged to be due the judgment creditor. It is said, that contracts or obligations ex contractu are of three descriptions, and they may be classed, with reference to their respective orders or degrees of superiority, as follows: 1. Contracts of record; 2. Specialties; 3. Simple contracts.

Contracts of record consist of judgments, recognizances, &c. Chitty on Cont. 3. See also the dissenting opinion of Justice Ruffin, in McDonald v. Dickson, supra.

The term "contract," as employed in the statute just cited, is used in its broadest legal sense—in a fundamental sense—and implies and embraces all things in action, that have the nature or legal quality of a contract as defined by the law. It is employed in a leading and distinguishing sense, in the formation of a system of procedure.

Therefore, the judgments sued upon in this action do arise out of contract, and the plaintiff, as assignee, may maintain an action upon them in his own name. * * *

The judgment must be affirmed. No error.

Affirmed.[35]

[34] The statement of facts is abridged and a portion of the opinion is omitted.

[35] In Childs v. Harris Manufacturing Co. (1887) 68 Wis. 231, 32 N. W. 43, it was held that a judgment for the payment of money only was a contract within a statute authorizing the joinder of causes of action arising out of "contract express or implied" (Rev. St. 1878, § 2647, subd. 2); Taylor, J., saying: "When we

NEVADA COMPANY v. FARNSWORTH.

(Circuit Court of the United States, D. Utah, 1898. 89 Fed. 164.)

Opinion on motion to dissolve attachment.

MARSHALL, District Judge.[36] The case made by the complaint is this: The plaintiff intrusted to the defendant, its agent, large sums of money with which to make certain payments. The defendant paid a portion of the money in accordance with the instructions, but retained a large part, and converted the same to his own use. The complaint, however, does not proceed in tort for the conversion, but ex contractu for money had and received to the plaintiff's use. In aid of the action, an attachment was sued out and levied on property of the defend-

consider the object of section 2647, we think it very clear that the Legislature intended to use the word 'contract' in said subdivision in its largest sense, and not in a restricted sense. The object of the section as a whole is to classify causes of action with reference to their joinder in one and the same action; and it attempts to give general rules for the joinder or nonjoinder of all actions. We must take it for granted that the Legislature knew that actions upon judgments were a common class of actions, and that the Legislature contemplated that it had made provision in said section for the classification of such actions. Unless an action upon a judgment is an action upon contract, express or implied, within the meaning of said subdivision 2, then actions upon judgments are not included within any of the provisions of said section, and are entirely unprovided for by the legislative classification. In this view of the subject, notwithstanding the fact that in other parts of the statute, and for other purposes, the Legislature seems to have made a distinction between contracts and judgments, that fact furnishes no good reason for holding that, in said section 2647, the word 'contract' was not intended to be used in its larger meaning, so as to cover a case of a judgment for the payment of money."

In O'Brien v. Young (1884) 95 N. Y. 428, 47 Am. Rep. 64, the statutory rate of interest had been reduced from 7 per cent. to 6 per cent. after the rendition of plaintiff's judgment. The statute contained a clause exempting from its operation "any contract or obligation" made prior to the passage of the act. Held, that this judgment was not a contract and that the exemption in the statute applied only to genuine contracts. Earl, J., said: "But is a judgment, properly speaking, for the purposes now in hand, a contract? I think not. The most important elements of a contract are wanting. There is no aggregatio mentium. The defendant has not voluntarily assented. All the authorities assert that the existence of parties legally capable of contracting is essential to every contract, and yet they nearly all agree that judgments entered against lunatics and others incapable in law of contracting are conclusively binding until vacated or reversed. In Wyman v. Mitchell (1823) 1 Cow. (N. Y.) 316, Sutherland, J., said that 'a judgment is in no case a contract or agreement between the parties.' In McCoun v. New York Cent. & H. R. R. Co. (1872) 50 N. Y. 176, Allen, J., said that 'a statute liability wants all the elements of a contract, consideration and mutuality as well as the assent of the party. Even a judgment founded upon contract is no contract.' In Bidleson v. Whytel, 3 Burr. 1545–1548, it was held after great deliberation and after consultation with all the judges, Lord Mansfield speaking for the court, 'that a judgment is no contract, nor can be considered in the light of a contract, for judicium redditur in invitum.' * * * But in some decided cases, and in text-books, judges and jurists have frequently, and, as I think, without strict accuracy, spoken of judgments as contracts. They have been classified as contracts with reference to the remedies upon them. In the division of actions ex contractu and ex delicto, actions upon judgments have been assigned to the former class."

[36] A portion of the opinion is omitted.

ant, who now moves to discharge the same on the following grounds: (1) That the plaintiff's cause of action is not based upon an express or implied contract; (2) that the debt or obligation is not shown to have been fraudulently contracted.

The statutes of Utah only permit of an attachment in an action upon a judgment, or upon a contract, express or implied; and it is urged with much force that, treating the action as in assumpsit, it is based upon a quasi contract, which it is a misnomer to call an implied contract, wanting, as it is, in most of the elements of a true contract. The whole theory of contracts implied in law was originated for the purpose of giving a remedy ex contractu for certain wrongs, and it does not promote clear thinking to embrace in one classification two things so essentially different as an obligation based on the consent of the parties and one imposed by law, from motives of public policy, frequently against the intention of the parties. But, however unscientific such a classification is, simple implied contracts are usually subdivided into contracts implied in fact and contracts implied in law. The first, it is needless to say, is a true contract, the agreement of the parties being inferred from the circumstances; the latter but a duty imposed by law, and treated as a contract for the purposes of a remedy only. This classification of implied contracts makes it difficult to interpret a statute where the term is used. In each case it becomes a question whether the general meaning, or the more limited, if more accurate, meaning, was, by the legislature, intended. This legislative intent must be sought in the particular statute in question, but, in the absence of any light thrown thereon by the language or object of the statute, or of other statutes in pari materia, it must be held, I think, that the legislature intended that meaning which is commonly assigned to the words, even if such definition be less accurate or scientific.

In this case it is urged that the statute has mentioned judgments and contracts, express or implied. That the expression of judgments, a species of quasi contracts, shows that the legislature did not intend to include under implied contracts such contracts as are implied in law. In the usual classification of contracts, judgments are classified as contracts of record, and simple contracts are subdivided into express contracts and implied contracts; and I think that it was the memory of this classification which caused the framers of the statute to treat judgments as different from implied contracts. There is nothing in the object of the statute which warrants the inference that it was intended to discriminate in favor of the wrongdoer. There is a plain reason why attachments were not permitted in actions sounding in damages, for, if allowed in such actions, property of the defendant might be incumbered in an amount altogether out of proportion to the sum finally recovered. But in assumpsit, where the tort is waived, the sum sued for is the benefit unjustly retained by the defendant; not the damage to the plaintiff, usually more uncertain in amount. Keener, Quasi Cont. 160. There is nothing in the wording of the statute which

would warrant a holding that the legislature used the term "implied contract" in other than its usual meaning, or that contracts implied in law were not intended to be included. The weight of authority supports this conclusion.

The question was raised in Bank v. Fonda, 65 Mich. 533–536, 32 N. W. 664, 665—a case similar to this, and under a similar statute—and Chief Justice Campbell, in giving judgment, said: "It is sufficient to say that, when the statute gives the remedy in cases of express and implied contract, we have no authority to graft an exception on the statute, and hold that there are differences in implied contracts; and that, where an action of tort will lie, the fact that assumpsit will also lie does not make the case one of contract. This distinction, if attempted, would lead to great confusion. In cases of bailment, there has always been a choice of forms of action between actions on the case and assumpsit, which is itself really an action on the case. Case lies for breach of duty, and assumpsit for breach of promise. A duty certainly arises out of promises; and the law implies a promise out of most duties. Whatever authorizes the implication of a promise authorizes a suit in assumpsit for its breach. That is the essence of the doctrine of implied assumpsit, and any further refinement on this doctrine would lead to no good end. There is no such equity in favor of wrongdoers that exceptions should be created in their favor." To the same effect are Elwell v. Martin, 32 Vt. 217, and Gould v. Baker, 12 Tex. Civ. App. 699, 35 S. W. 708.[37] The authorities are collected in 3 Am. & Eng. Enc. Law, 192.

In Fuel Co. v. Tuck, 53 Cal. 304, the defendant agreed to manufacture certain machines for plaintiff, and deliver them within a specified time. A part of the purchase money was advanced to defendant, who failed to complete the machines within the time limited. The plaintiff thereupon sued to recover the money advanced, upon the ground that the consideration upon which it was paid had wholly failed. An attachment was sued out in aid of the action, and defendant sought to have the same discharged, for the reason that the cause of action did not arise upon a contract express or implied. The court said that "the authorities appear to be uniform to the effect that, where a sum of money has been paid upon a consideration which has entirely failed, the law implies a promise to refund it"; and the attachment was sustained.

In Tabor v. Mining Co. (C. C.) 14 Fed. 636, Judge Hallett, in concluding that the Colorado statute did not permit an attachment in a suit for the proceeds of ore converted by defendant,—a result clearly warranted by the course of legislation on the subject in Colorado, as

[37] In the case last cited the court held: "Where an action against a thief to recover judgment for stolen money is brought as for money had and received upon an implied promise, the tort is thereby waived, and the action will be regarded as one ex contractu, in which an attachment against the property of the defendant will lie."

shown in the opinion,—distinguished the case of Fuel Co. v. Tuck by saying that the implied contract in that case "may be assigned to the class of tacit agreements already mentioned, which, if not expressed in words, are evincible from the acts of the parties, and stand fully within their intention." The case at bar can be similarly distinguished from Tabor v. Mining Co. Wherever a definite duty arises out of a contract or contract relation, a promise to perform that duty may, without violence, be considered as a term of the contract implied in fact. A principle of law attaches it to the contract, and the parties are conclusively presumed to contract with reference to such principle.

In Pollock on Contracts, p. 11, in discussing this question, the author says: "Sometimes, no doubt, it is difficult to draw the line. 'Where a relation exists between two parties which involves the performance of certain duties by one of them, and the payment of reward to him by the other, the law will imply (fictitious contract) or the jury may infer (true contract) a promise by each party to do what is to be done by him.' Morgan v. Ravey (1861) 6 Hurl. & N. 265. It was held in the case cited that an innkeeper promises in this sense to keep his guest's goods safely. The case of a carrier is analogous. So where A. does, at B.'s request, something not apparently illegal or wrongful, but which in fact exposes A. to an action at the suit of a third person, it seems to be, not a proposition of law, but an inference of fact which a jury may reasonably find, that B. must be taken to have promised to indemnify A. Dugdale v. Lovering (1875) L. R. 10 C. P. 196."

In this case the complaint shows an employment of defendant as the plaintiff's agent, a custody by him, in the course of his employment, of the plaintiff's money, and a failure to pay the same to the plaintiff on demand. It may be said that the duty to pay the money arose out of the contract of employment, and the failure so to do was a violation of that contract. Bank v. Fonda, 65 Mich. 533–536, 32 N. W. 664.

As to the second ground on which the motion is based, it appears that in the affidavit the cause of attachment is set out in the language of the statute, but that the facts showing that the debt was fraudulently contracted, or the obligation fraudulently incurred, are not stated. The statement of the cause of attachment in the language of the statute, and without setting out the specific acts of fraud, has been very generally held sufficient. Auerbach v. Hitchcock, 28 Minn. 73, 9 N. W. 79; Sharpless v. Ziegler, 92 Pa. 467; Stevens v. Middleton, 26 Hun (N. Y.) 470; Wap. Attachm. §§ 122, 123. * * *

The motion to discharge the attachment is denied.[38]

[38] In First National Bank of Nashua v. Van Vooris (1895) 6 S. D. 548, 62 N. W. 378, it was held that a judgment of a sister state is to be deemed a contract within a local statute authorizing the issue of an attachment in an "action arising upon contract"; Kellam, J., saying: "We are inclined to regard a judgment, not as a contract, but as a quasi contract, which the Legislature and the court have treated as a contract in respect to the remedy by subsequent action upon it; and so, as before suggested, the question whether, un-

(C) Stockholders' Statutory Liability

CHRISTOPHER v. NORVELL.

(Supreme Court of the United States, 1906. 201 U. S. 216, 26 Sup. Ct. 502, 50 L. Ed. 732, 5 Ann. Cas. 740.)

In Error to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of Florida, enforcing, as against a married woman, the statutory liability of a stockholder in a national bank.

Mr. Justice HARLAN delivered the opinion of the court.[39]

By the Revised Statutes of the United States it is provided that the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; that persons holding stock as executors, administrators, guardians, or trustees shall not be personally subject to any liabilities as stockholders, the estates and funds in their hands being liable in like manner and to the same extent as the testator, intestate, ward, or person interested in such trust-funds would be if living and competent to act and hold the stock in his own name; and that a receiver of a national bank may, if necessary, to pay the debts of such association, enforce the individual liability of the

der our statute, an attachment may issue in an action on a judgment depends upon the sense in which the Legislature used the expression, 'action arising on contract.' If used in the exact and literal sense, an action on a judgment would not, in our opinion, be included; but if used in a general and leading sense, to distinguish actions of one class from those of the other, then the expression must be presumed to have been used in view of the common understanding and practice that actions on judgments were actions on contracts. I think the same meaning was intended here, as by the same words in section 4915 [Comp. Laws 1887], providing that a cause of action 'arising on contract' may be pleaded as a counterclaim."

THE UNITED STATES COURT OF CLAIMS is given jurisdiction of "all claims founded upon * * * any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort. * * *" Act March 3, 1887, c. 359, 24 Stat. 505 (Comp. St. 1913, § 1136[1]). This statute has been held not to include claims in quasi contract based on a waiver of a tort, but only those founded on "a convention between the parties—a coming together of the minds." Schillinger v. United States (1894) 155 U. S. 163, 15 Sup. Ct. 85, 39 L. Ed. 108; Harley v. United States (1905) 198 U. S. 229, 25 Sup. Ct. 634, 49 L. Ed. 1029. But the Supreme Court has gone far in finding an actual contract. United States v. Société Anonyme Des Anciens Etablissements Cail (1912) 224 U. S. 309, 32 Sup. Ct. 479, 56 L. Ed. 778; United States v. Buffalo Pitts Co. (1914) 234 U. S. 228, 34 Sup. Ct. 840, 58 L. Ed. 1290.

An amendment of 1910 confers jurisdiction upon the Court of Claims in cases involving the unauthorized use of a patented invention by an officer of the United States. See Crozier v. Krupp (1911) 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771.

[39] Portions of the opinion are omitted.

stockholders. Rev. Stat. §§ 5151, 5152, 5234, U. S. Comp. Stat. 1901, pp. 3465, 3507.

Proceeding under these statutes the receiver of the First National Bank of Florida brought this action against Henrietta S. Christopher (her husband, John G. Christopher, being joined as codefendant) to recover the amount due from her as a shareholder of that bank under an assessment made by the Comptroller of the Currency against the stockholders of that bank in order to pay its debts.

The case made by the record is this: At the time of the failure of the bank, on March 14, 1903, fifteen shares of its stock stood in the name of Mrs. Christopher. The stock was bequeathed to her by her father in 1886, and his executors caused it to be transferred to her name on the books of the bank. This was done without any request from or direction by her. Although not aware of such transfer until the stock had been issued and delivered to her in November, 1887, since that date she has held the certificate for the fifteen shares. It is shown that in 1894, she joined with other shareholders in securing an amendment of the bank's articles of association, which extended the corporate existence of the bank until the close of business on May 26th, 1914. It further appears that she received several semiannual dividends, from three to five per cent., on her stock. * * *

A personal judgment was rendered in the circuit court against Mrs. Christopher for the amount due on the assessment made by the Comptroller. The judgment was affirmed by the circuit court of appeals. * * *

Did the coverture of Mrs. Christopher at the time her name was placed on the books of the bank as a shareholder, as well as when she received the certificate of stock, protect her against a personal judgment at law for the amount due under the assessment made by the Comptroller of the Currency? That is the controlling question in the case.

This question is, we think, substantially answered by the judgment of this court in Keyser v. Hitz, 133 U. S. 138, 150–152, 33 L. Ed. 531, 537, 538, 10 Sup. Ct. 290, 294, 295. * * *

The argument is that at common law a married woman could not make, or bind herself personally by, a contract, and was incapable, by the law of Florida, as at common law, of entering into a contract, at least one that would subject her to personal liability; that the relation of a shareholder to a national banking association was of a contractual character; and consequently, to render a personal judgment against the defendant Mrs. Christopher was, in effect, to hold her personally bound by a contract which, under the laws of Florida, she was incapable of making.

The vice in this argument is in the assumption that the liability of Mrs. Christopher as a shareholder arises wholly out of contract between herself and the bank or its creditors; whereas, upon becoming a shareholder, she made, strictly, no direct contract with anyone, and became, as was held in Keyser v. Hitz, supra, by force of the statute individually responsible to the amount of her stock, for the contracts,

debts, and engagements of the bank equally and ratably with other shareholders. Such statutory liability was created for the protection of creditors, and in order to strengthen the bank in the confidence of the public. The bank, although its shares of stock were private property, was an instrumentality of the general government in the conduct of its affairs. Farmers' & M. Nat. Bank v. Dearing, 91 U. S. 29, 33, 23 L. Ed. 196, 198. In Davis v. Elmira Sav. Bank, 161 U. S. 275, 283, 40 L. Ed. 700, 701, 16 Sup. Ct. 502, 503, the court said that "national banks are instrumentalities of the Federal government, created for a public purpose, and as such necessarily subject to the paramount authority of the United States." This principle was reaffirmed in Easton v. Iowa, 188 U. S. 220, 237, 47 L. Ed. 452, 459, 23 Sup. Ct. 288. See, also, Pacific Nat. Bank v. Mixter, 124 U. S. 721, 31 L. Ed. 567, 8 Sup. Ct. 718. * * *

In Robinson v. Turrentine (C. C.) 59 Fed. 554, 555, it was held that the liability of a married woman for an assessment upon national bank stock did not grow out of contract, although it was one of a class of liabilities which may be enforced by an action in form ex contractu. * * *

Recurring to the provisions in the statute and Constitution of Florida it is clear that they do not incapacitate a married woman in that state from becoming the owner, by bequest or otherwise, of stock in a national banking association. On the contrary, it seems that all property, real or personal, owned by a married woman before marriage, or lawfully acquired afterward by gift, devise, bequest, descent, or purchase, is her separate property. Nevertheless, it is said, by the settled course of decisions in that state a married woman cannot bind herself personally by contract at law or in equity, or by becoming a partner, or by making a promissory note. Dollner v. Snow, 16 Fla. 86; Hodges v. Price, 18 Fla. 342; Goss v. Furman, 21 Fla. 406; De Graum v. Jones, 23 Fla. 83, 6 South. 925, and Randall v. Bourgardez, 23 Fla. 264, 2 South. 310, 11 Am. St. Rep. 379. But those cases are not in point here; for, in each of them, the personal liability attempted to be imposed upon the married woman arose entirely out of contract, express or implied, on her part, and not by force of any statute.

The argument made in this case in behalf of Mrs. Christopher assumes that the liability sought to be fastened upon her arises wholly out of contract; that is, out of an implied obligation, at the time her name was placed on the registry of shares and she received dividends, to contribute to the extent of the value of such shares to the payment of the debts of the bank. But that implied obligation, although contractual in its nature, could not, standing alone, be made the basis of this action. Without the statute she could not be made liable individually for the debts of the bank at all. No implied obligation to contribute to the payment of such debts could arise from the single fact that she became and was a shareholder. Her liability for the debts of the bank is created by the statute, although in a limited sense

there is an element of contract in her having become a shareholder; and the right of the receiver to maintain this action depends upon, and has its sanction in, the statute creating liability against each shareholder, in whatever way he may have become such. There have been cases in which there appeared such elements of contract as were deemed sufficient, in particular circumstances, to support an action. First Nat. Bank v. Hawkins, 174 U. S. 364, 372, 43 L. Ed. 1007, 1011, 19 Sup. Ct. 739; Whitman v. National Bank, 176 U. S. 559, 565, 566, 44 L. Ed. 587, 591, 592, 20 Sup. Ct. 477; Matteson v. Dent, 176 U. S. 521, 44 L. Ed. 571, 20 Sup. Ct. 419. But that fact does not justify the contention that an action upon an assessment made by the Comptroller is not based upon the statute. * * *

All shareholders of stock in national banks become such, subject to the condition, declared by statute, that liability, to the extent of their shares, is imposed upon them for the contracts, debts, and engagements of the bank. The statute, in effect, says to all who become owners of national bank stock, no matter in what way they become shareholders, that they cannot enjoy the benefits accruing to shareholders, and escape liability for the contracts, debts, and engagements of the bank. In other words, the government that created the bank has prescribed the terms upon which ownership of its shares could be acquired, and individual liability incurred by shareholders,—executors, administrators, guardians, or trustees only being exempted from individual liability. No exception is made in favor of married women holding property. If the Constitution or statutes of Florida had expressly incapacitated or forbidden a married woman from becoming, under any circumstances, the owner of bank shares,—as counsel for plaintiff in error insists is the case,—a question would be presented that does not arise upon the record of this case; and as the local law does not forbid married women from becoming the owners of bank stock, we do not go beyond what is necessary for the decision of the present case under the national banking law. All that we now decide is that the court below properly interpreted the statute, and did not err in rendering a personal judgment against Mrs. Christopher, as a shareholder in the bank, for the amount due under the assessment of the Comptroller. In what way the plaintiff may proceed in order to obtain satisfaction of the judgment is not a question to be determined in this action.

Judgment affirmed.

Mr. Justice WHITE and Mr. Justice MCKENNA concur in the result.[40]

[40] In Hencke v. Twomey (1894) 58 Minn. 550, 60 N. W. 667, it appeared that an action had been brought and a judgment obtained in the state court by the receiver of the First National Bank of Duluth for the recovery of an assessment against a nonresident stockholder owning real property within the state. Such defendant had been served by publication. Mitchell, J., said: "Under the statute then in force, in actions for the recovery of money the summons could be served on a nonresident by publication only when the action arose on contract; and it is urged that the judgment referred to was void because an

(D) Contract Clause of Federal Constitution

McAFEE v. COVINGTON.

(Supreme Court of Georgia, 1883. 71 Ga. 272, 51 Am. Rep. 263.)

Covington et al. filed their bill against McAfee et al. to enjoin the sale of certain property claimed as homestead property. Subsequently, by amendment, it was alleged that the sheriff had offered the property at public outcry, that it was bid off by certain purchasers, and the sheriff would proceed to put them in possession unless injunction issue. The controlling facts were as follows: In 1867, a judgment in a trover case for a mule was rendered against Covington. In 1869 he took a homestead under the constitution of 1868, and subsequently went into bankruptcy; but the creditor did not prove the claim. The execution founded on this judgment was subsequently levied on the homestead, and it was claimed that the homestead was subject, because otherwise the homestead act of 1868 would impair the obligation of a contract, and be obnoxious to the constitution of the United States. Article 1, § 10, par. 1.

The chancellor held that a judgment based on a tort was not a contract, and granted the injunction. Defendants excepted.

HALL, J. The question to be determined here is, whether a judgment consequent upon an action for a tort, growing out of the wrongful conversion of personal property, is a contract within the meaning of article 1, § 10, par. 1, of the constitution of the United States, which forbids a state to pass any law impairing the obligation of a contract. The execution under which the homestead exemption was sold, was obtained prior to the adoption of the state constitution of 1868. If, therefore, that judgment was the result of a suit founded upon a contract, then, according to the case of Gunn v. Barry, 15 Wall. 610, 21 L. Ed. 212, the homestead set apart to the defendant therein was subject to levy and sale, notwithstanding the prohibition contained in

action against a stockholder of a corporation to recover on his personal liability, under the statute, for the debts of a corporation, is not one 'arising on contract.' Gen. St. 1866, c. 66, § 45. The point is not well taken. Upon becoming a stockholder, the party assumes the obligations imposed by the statute, which forms a part of the contract. The contract is one implied by statute. While the action of the Comptroller in making the assessment is essential to the receiver's right of action, yet it is not the ground of the stockholder's liability. His liability grows out of his implied contract."

Compare McClaine v. Rankin (1905) 197 U. S. 154, 25 Sup. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500, where it was held in construing the statute of limitations that an action to enforce the statutory liability of a stockholder of a national bank was not "an action upon a contract or liability, express or implied." White, J., dissented, pointing out that this decision seems inconsistent with the earlier decision of the same court in Carrol v. Green (1875) 92 U. S. 509, 23 L. Ed. 738. See 5 Columbia Law Review, 606.

As to whether the statutory liability of stockholders for the "debts" of the corporation includes quasi contractual obligations, see Avery & Son v. McClure (1908) 94 Miss. 172, 47 South. 901, 22 L. R. A. (N. S.) 256 (with note), 19 Ann. Cas. 134.

the constitution of 1868, and the injunction prayed in this case should not have been ordered; but if it was not rendered in a suit upon a contract, as it evidently was not, then the propriety of ordering the injunction will depend upon the further question, whether such a judgment was of itself a contract between the parties thereto. That it is a "debt of record" will not be disputed. In order to constitute a contract, there must be an agreement, either express or implied, between parties, for the doing or not doing of some specific thing. Code 1882, § 2714. This agreement becomes a contract of record when it has been declared and adjudicated by a court having jurisdiction, or when it is "entered of record, in obedience to, or in carrying out, the judgment of a court." Code 1882, § 2716. It is essential to a contract that the parties assent to its terms. Id. §§ 2720, 2727. How can this be predicated of a tort to either person or property? In Todd v. Crumb, 5 McLean, 172, Fed. Cas. No. 14,073, it was distinctly held that a judgment was not an agreement, contract or promise in writing. So, also, in Bidleson v. Whytel, 3 Burrow's R. 1548. In Garrison v. New York, 21 Wall. 203, 22 L. Ed. 612, it was said by Field, J., who delivered the opinion: "It may be doubted whether a judgment founded on an agreement, express or implied, is a contract within the meaning of the constitutional prohibition. It is sometimes called by text writers a contract of record, because it establishes a legal obligation to pay the amount recovered, and, by a fiction of law where there is a legal obligation to pay, a promise to pay is implied. [It is upon this principle, says Chitty, that an action in form ex contractu will lie on a judgment of a court of record.[41]] But it is not perceived how this fiction can convert the result of a proceeding not founded on an agreement, express or implied, but upon a transaction wanting the assent of the parties, into a contract, within the meaning of the Federal constitution, which forbids any legislation impairing its obligation. The purpose of the constitutional prohibition was the maintenance of good faith in the stipulations of parties against any state interference. If no assent be given to a transaction, no faith is pledged with respect to it, and there would seem in such a case to be no room for the operation of the prohibition." It seems to have been long settled that claims arising from a tort, and not from a contract, are not protected from legislative interference by this provision of the constitution of the United States. Dash v. Van Kleeck, 7 Johns. (N. Y.) 477, 5 Am. Dec. 291; Amy v. Smith, 1 Litt. (Ky.) 326; Thayer v. Seavey, 11 Me. 284. In Robinson v. Howe, 13 Wis. 341, it is distinctly held, that "those rights which the law gives to, or obligations which it imposes upon persons in certain relations, independently of any stipulations which the parties themselves have made," are not within the protection of this clause. An

[41] The sentence inclosed in brackets is omitted in the quotation in McAfee v. Covington, but is found at this place in the report of Garrison v. New York (1874) 21 Wall. 196, 203, 22 L. Ed. 612.

uninterrupted and unbroken current of authorities has settled that a state may pass laws divesting vested rights, not connected with and forming an essential part of the obligation of a contract, without infringing the constitution of the United States. Among many others, we cite Charles River Bridge v. Warren Bridge Co., 11 Pet. 420, 9 L. Ed. 773; Watson v. Mercer, 8 Pet. 88, 8 L. Ed. 876; Satterlee v. Matthewson, 2 Pet. 413, 7 L. Ed. 458. For a full and satisfactory review of the authorities upon the questions raised in this case, we refer to the exhaustive and able opinion of Fenner, J., in the State ex rel. Folsom Bros. v. Mayor, etc., of New Orleans, 32 La. Ann. 709, 714–717, and also to Forsyth v. Marbury, R. M. Charlt. (Ga.) 324. The counsel for the plaintiffs in error relied with much confidence upon an expression used by Warner, C. J., in his dissenting opinion, in Fannin v. Durden, 54 Ga. 482, in which it is contended he broadly asserted that a judgment was a contract of record, and that an act of the legislature which authorized proceedings to reduce its amount was repugnant to this clause of the constitution of the United States, and was a mere nullity; but we apprehend that this eminent judge never meant to carry this principle to the extent claimed. He was laying down the law applicable to the case before him, which was a judgment in a suit founded on a promissory note made before the commencement of the late war, for good money loaned to the maker of the note. This amount, although in judgment, had been reduced to conform to the standard of Confederate values, under the second section of the so-called "Relief Act" of 1868, and upon a motion to set aside the judgment so reducing the amount of the former judgment, and which came up for review before this court, the chief justice used the language cited. He was not dealing with the power of the legislature to modify and prevent the enforcement of judgments founded on torts, against homesteads and exemptions set apart to heads of families for the use and support of such families, and we are reluctant to conclude that he would have so applied the principle. Indeed, he does not seem to have considered how far the legislature had the power to interfere with vested rights, without encroaching upon the provision of the constitution of the United States which protects the obligation of contracts from such interference.

On the question here considered we rest our judgment in this case, not deeming it either necessary or proper to pass upon the other important questions raised by the record, and particularly upon the effect of the homesteader's discharge in bankruptcy, upon the judgment making the sale of his homestead; for the purposes of this case, it is quite immaterial whether it was extinguished by the discharge or not.

Judgment affirmed.[42]

[42] In Freeland v. Williams (1889) 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193, the facts were as follows: The West Virginia constitution of 1872 exempted persons from civil liability for acts done during the Civil War in ac-

CHAPTER II

BENEFITS CONFERRED BY MISTAKE

SECTION 1.—THE GENERAL DOCTRINE: MISTAKE OF FACT [1]

I. Fundamental Distinctions

(A) Mutual Mistake—Unilateral Mistake

POOL v. ALLEN.

(Supreme Court of North Carolina, 1846. 29 N. C. 120.)

Appeal from the Superior Court of Law of Person County, at the Fall Term, 1846, his Honor Judge Battle presiding.

This is an action of assumpsit, commenced by warrant before a Justice of the Peace. It was tried in the Superior Court on the general

cordance with the usages of civilized warfare, and in pursuance of this provision the state legislature enacted that a judgment recovered for such an act should, on petition, be set aside. Accordingly the state court, on petition of Williams, set aside a judgment obtained by Freeland against Williams in 1865 in an action of trespass de bonis asportandis for taking and converting the cattle of Freeland under command of General Lee of the Confederate Army. Freeland's petition for an appeal to the Supreme Court of Appeals of the State of West Virginia having been by that court denied, Freeland then brought a writ of error in the United States Supreme Court. It was there held that such judgment in tort was not within the protection of the clause of the Federal Constitution forbidding the impairment by a state of the obligation of contract.

In Louisiana ex rel. Folsom v. Mayor of New Orleans (1883) 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936, it was held that a judgment obtained pursuant to a state statute against a municipality for injuries to property done by mob violence was not protected by the Federal Constitution. Mr. Justice Field, in speaking for the court, said: "The right to reimbursement for damages caused by a mob or riotous assemblage of people is not founded upon any contract between the city and the sufferers. Its liability for the damages is created by a law of the legislature, and can be withdrawn or limited at its pleasure, * * * and its character is not at all changed by the fact that the amount of loss, in pecuniary estimation, has been ascertained and established by the judgments rendered. The obligation to make indemnity created by the statute has no more element of contract in it because merged in the judgments than it had previously. The term 'contract' is used in the Constitution in its ordinary sense, as signifying the agreement of two or more minds, for considerations proceeding from one to the other, to do, or not to do, certain acts. Mutual assent to its terms is of its very essence."

A judgment based on a true contract is, however, held to be within the constitutional provision. Nelson v. St. Martin's Parish (1884) 111 U. S. 716, 4 Sup. Ct. 648, 28 L. Ed. 574.

[1] "An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist." Per Savage, C. J., in Mowatt v. Wright (1828) 1 Wend. (N. Y.) 355, 360, 19 Am. Dec. 508.

issue; and upon the trial the facts appeared to be as follows: The plaintiff and the defendant resided in Person County until the year 1838, when the plaintiff removed to another State. At the time of his removal, the plaintiff was indebted to the defendant in the sum of $23.85, and he appointed two persons, Stanford Long and Wyatt Pool, his agents in this State, with directions, amongst other things, to pay the debt which he owed to the defendant. At that time, the defendant had placed his claim in the hands of H. Bumpass, a constable, to collect; and soon afterwards, Wyatt Pool saw Bumpass and paid him the money in full. About a month afterwards, Long met with Allen, the defendant, and informed him that he had been instructed by the plaintiff to discharge the debt, and that he was ready to do so as soon as he could see Bumpass, who held the claim for collection. To that the defendant replied, that the debt belonged to him, and that he was the proper person to receive the money; and he said that, if Long would pay it to him, he would stand between him and danger. Upon that assurance, Long paid the debt, $23.85, to Allen; and upon its being afterwards discovered, that it had been before paid by Wyatt Pool to Bumpass, the money paid to the defendant, Allen, was reclaimed from him, and this suit brought to recover it.

Upon these facts, the counsel for the defendant moved the Court to instruct the jury, that the plaintiff ought not to recover, because it did not appear that Bumpass had paid to the defendant the sum which had been paid to Bumpass, and the payment by Long to the defendant himself was voluntary. But the Court refused the prayer, and directed the jury, that if they believed the witnesses, who stated the facts, the plaintiff was entitled to recover. There was a verdict for the plaintiff, and from the judgment, the defendant appealed.

RUFFIN, C. J. The payment to Bumpass discharged the debt. It made no difference, that he did not pay the money over. That was between him and his principal, Allen. As he was Allen's agent, with authority to receive the money, the payment of it to him was the same as payment to the creditor personally. Then, as the debt was discharged, the second payment, to Allen himself, was without consideration, and made by mistake; and the case is, therefore, one of those common ones, stated in the books, in which the action for money had and received lies. The second payment was not voluntary, in any sense that can affect this action. It is true, it was not illegally exacted by process or by duress. But that is not the criterion. Money paid as a debt, under a mistake and where no debt exists, may be recovered back, although there was no compulsion on the person to make the payment. There was no intention here to make a gift of the money, so as in that sense to constitute it a case of a voluntary payment. On the contrary, it was clear that the money was paid and received in discharge of a debt then believed to subsist. In that there was a total mistake on the part of the person making the payment, and, probably, on that of the receiver also; and it is plain that money, thus got under

a mistake, and for no consideration, cannot be kept ex equo et bono. On that ground, then, the plaintiff was entitled to a verdict. But here the case goes further, and sets out in substance an express promise to return the money, if it were not then properly payable to the defendant. It was said, indeed, that the defendant's promise was to indemnify Long against personal loss, and did not extend to the present plaintiff. But clearly the promise must be considered as made to Long in the character in which he was then acting, namely, as the plaintiff's agent. The case is one, therefore, in which there can be no hesitation in affirming the judgment.

PER CURIAM. Judgment affirmed.[2]

TINSLAR v. MAY.

(Supreme Court of Judicature of New York, 1832. 8 Wend. 561.)

This was an action of assumpsit, tried at the Rensselaer circuit in June, 1830, before the Hon. James Vanderpoel, one of the circuit judges.

The declaration contained the common money counts. The plaintiff proved that in the settlement of a bond and mortgage which he held against the defendant, the defendant was credited by mistake with $136.32, the interest of the principal sum due the plaintiff for the year ending on the 1st April, 1825; that the settlement took place on the 2d

[2] In Millett v. Holt (1872) 60 Me. 169, the parties were joint owners of a parcel of real estate, and agreed to cut the wood and timber on the same, pay each his half of the expense of the operation, and divide equally the proceeds of the sale of the wood and timber so cut. Holt had the general charge of the business, employing the most of the laborers, and paying most of the bills, amounting to $3,033.58. Millett boarded some of the choppers, and hauled some of the wood, and his bill amounted to $421. Upon settlement, the parties added all the expenses together, making $3,454.58, and then divided the sum by two, making the quotient $1,727.29, which each should pay. And thereupon the plaintiff paid the defendant the sum of $1,727.29, and now brings this suit to recover the sum of $421 which he claims was paid by mistake. Danforth, J., in holding for the plaintiff, said: "It seems that the parties in making their settlement, added the plaintiff's bill to the defendant's, when it should have been deducted from it, in consequence of which the plaintiff paid four hundred and twenty-one dollars more than he should have done. This was done as much by the mistake of the one as the other, and now he asks that it may be paid back to him. And why should it not be? If this action is sustained under the statement of facts presented, it will only be invoking one of the most common principles of law, and add one more to the long list of cases maintained to recover back money paid under a mutual mistake of fact."

As to the right to recover at law an overpayment made pursuant to a deed which, by a mutual mistake, does not express the true intent of the parties, the authorities, as well as text-writers, are in disagreement. See Howes v. Barker (1808) 3 Johns. (N. Y.) 506, 3 Am. Dec. 526. (Plaintiff must resort to a court of equity and have the deed reformed.) Butt v. Smith (1904) 121 Wis. 566, 99 N. W. 328, 105 Am. St. Rep. 1039. (Allowing action at law. The contract is not merged in the deed.) See, also, Ragsdale v. Turner (1909) 141 Iowa, 604, 120 N. W. 109; Woodward, Quasi Contracts, § 180; Keener, Quasi Contracts, 123, 124.

April, 1830, when the sum of $1448.61 was paid to the plaintiff, and the bond and mortgage assigned by the plaintiff to a brother of the defendant, at the request of the defendant. The plaintiff claimed to recover the above sum credited by mistake. The defendant objected that the plaintiff could not recover as for money had and received; that he should have declared either specially or upon the original consideration, and if the bond and mortgage were canceled, he should have resorted to a court of equity; which objection was overruled, and the plaintiff had a verdict for the amount of the sum credited by mistake, with the interest thereof. The defendant moved for a new trial.

SUTHERLAND, J. I think the motion for a new trial should be denied. The action for money had and received will lie. The mistake was equivalent to so much money to the defendant; he had a credit to that amount, to which he was not entitled. The jury have found the fact of mistake, and there can be no doubt that ex æquo et bono the defendant ought to refund to the plaintiff. New trial denied.

DEVINE v. EDWARDS.

(Supreme Court of Illinois, 1881. 101 Ill. 138.)

SHELDON, J.[3] This was a suit to recover a sum claimed to be due to plaintiff from defendant, for a quantity of milk shipped by the former to the latter from Dundee, Illinois, to Chicago, during the month of March, 1875. Defendant filed a plea of set-off, alleging that for five years next prior to the commencement of the suit he had been purchasing milk of plaintiff by the gallon; that it was shipped in cans supposed by both parties to hold eight gallons each; that payments for the milk, from time to time, were made, on the basis of a capacity of eight gallons to a can; that in fact the cans held a less quantity, and that by the error defendant had overpaid plaintiff a large sum of money, which he offered to set off in this case. There were a verdict and judgment in favor of plaintiff for the full amount of his claim, including interest. On appeal to the Appellate Court for the First District the judgment was affirmed, and defendant appealed to this court.

At the trial in the circuit court defendant asked the following instruction, which the court refused to give: "The jury are instructed, that even if they believe, from the evidence, that at some time in December, 1870, at Chicago, it was agreed between the plaintiff and defendant that the narrow neck cans (so called) of the plaintiff held eight gallons of milk, yet if the jury further believe, from the evidence, that such agreement was made under the mistaken belief by the defendant that such cans actually held eight gallons, then the defendant would not be bound by such agreement."

[3] A portion of the opinion is omitted.

This same case was before us on a former occasion, (87 Ill. 177,) when we said with reference to the subject of this set-off: "The contract under which the milk was sold was for a given price per gallon. It was the duty of appellee to see to it that his cans should hold the quantity which he professed they held. It does not lie in his mouth to complain that appellant did not watch him with the care which the circumstances seemed to demand. If, in truth and in fact, by the mistake of appellant and that of appellee, the amount of the milk was short, and appellee received more money on that account than he was entitled to, he must account for the same, even though the mistake resulted from negligence on the part of appellant as well as on the part of appellee. The real question is as to the fact of the alleged shortage. If that existed, the appellant is entitled to have the wrong corrected, by way of set-off." We think the same remarks are applicable, although there was the agreement stated in the instruction, if it was made under the mistaken belief as therein named, and that the instruction should have been given. * * *

Judgment reversed.

LOWE v. WELLS FARGO & CO. EXPRESS.

(Supreme Court of Kansas, 1908. 78 Kan. 105, 96 Pac. 74.)

Error from District Court, Lyon County; F. A. Meckel, Judge.

Assumpsit to recover the sum of $406.84. The case was tried without a jury upon an agreed statement of facts. The plaintiff's son, W. H. Lowe, was in the employ of the express company at Emporia, as express messenger. A part of his duty as such was to receive and receipt for packages at the trains, convey them to the express office, and take a receipt therefor. He received and receipted for a package containing $406.84 at a train, and no further trace of it could be found. The company demanded payment of the amount of money from the boy. The father believing his son had dropped the package between the train and the express office, and it had thus been lost, paid the amount to the company. It was afterwards learned that the son safely conveyed the package to the company's office and placed it with other packages, but failed to take a receipt therefor; that another employé of the company, Davis, stole the package, squandered the money, and the company never recovered it. The company was protected by surety bonds as to both employés. After the facts were discovered, the father demanded from the company a return of the money paid, which being refused, he brought this suit.

SMITH, J.[4] * * * To entitle the plaintiff to recover, we shall assume, in accordance with the contention of the defendant, that

[4] The statement of facts is taken from the syllabus by the court and portions of the opinion are omitted.

the mistake must have been at the time of the payment mutual, and the alleged mistaken fact material. What, then, was the situation at the time of the payment? The money had been lost. Diligent efforts were made by both parties to discover what became of it, and resulted in tracing it to the hands of the plaintiff's son. He could not account for it, and no further trace of it could be found. Before reaching Emporia, where the investigation was made, defendant's representative and another man, who accompanied him to make the the investigation, informed plaintiff "that it was evident that one of two men had the money." After making the investigation, they informed the plaintiff and his son "that they were unable to find out anything concerning the loss," and demanded payment of the amount lost from the plaintiff's son. "This plaintiff, believing the fact to be that after said W. H. Lowe had received the package at Emporia, that he had dropped the same before reaching the defendant's office at the depot in Emporia, and further believing that some one had picked the same up and carried it away, * * * paid the amount of the loss to the defendant."

When the defendant's agent, under these circumstances, demanded payment of the loss from the plaintiff's son, and received the payment, we think the defendant should not be heard to say that it did not believe that the plaintiff's son had lost or appropriated the money. Both parties, then, believed a material fact to exist which did not exist, and which alone led to the payment of the money. That another stole the money after the plaintiff's son had "safely conveyed it to defendant's office at the depot in Emporia, Kan., and there placed it with other packages," is not material, except to show the mistake by reason of which the plaintiff paid the money. There is no recital in the statement of facts and there is no presumption that the failure of W. H. Lowe to take receipt for the package induced Davis to steal the package. It is true the rule of the company required W. H. Lowe to take a receipt for each article of express which came into his possession as agent of the defendant when he parted with such possession. His failure to do so was negligence, and for such negligence he was responsible to the company for such damages as could be reasonably anticipated to flow therefrom. We cannot say, however, that when he safely deposited the package in the defendant's office with other packages, presumably of like character, that it was reasonably to be anticipated that some other employé of the company would steal the package. If not, there was no consideration for the payment. The theft was the proximate and independent cause of the loss; the negligence was not. The payment was made and received on the belief that W. H. Lowe and not another had lost or appropriated the package. * * *

It is contended that the payment in question was a voluntary payment, and cannot be recovered back, and, among other authorities

cited to support this proposition, the following are cited: Phillips v. Board County Com'rs, 5 Kan. 412; Commissioners v. Walker, 8 Kan. 431; Irwin v. Thomas, 12 Kan. 93; K. P. Ry. Co. v. Com'rs, 16 Kan. 587; Sapp v. Com'rs, 20 Kan. 245; Thimes v. Stumpff, 33 Kan. 53, 60, 5 Pac. 431. We have examined all these cases and find that they are really authorities against the proposition contended for. The decisions, in each case, are based upon the proposition that the plaintiff with full knowledge of the facts voluntarily made the payment. In the case at bar, the plaintiff made every reasonable effort to ascertain what became of the lost package of money without success. The facts which came to his knowledge from investigation evidently led him to believe, and he paid the money believing, that his son had lost the package by dropping it. This was not true. It was lost by being stolen by another employé from a place in the defendant's office, where the plaintiff's son had safely deposited it. This we think is a clear mistake of fact. A fact was believed to exist which did not exist, and a fact existed which was not known; otherwise the money would not have been paid, it is safe to infer. Under the real facts, neither the plaintiff nor his son were under a duty to pay the loss, nor had the defendant any right to retain it after it was paid. The company was indemnified against loss as well through the misfeasance of Davis as of young Lowe. * * *

The judgment is reversed, and the case is remanded, with instructions to render judgment for the plaintiff.

HENDRICKS v. GOODRICH.

(Supreme Court of Wisconsin, 1862. 15 Wis. 679.)

Appeal from the Circuit Court for Rock County.

Action to recover $100 which the plaintiff claimed to have paid the defendant under a mistake of fact. The plaintiff had contracted with the defendant for a tract of land, and had, at different times during four years, made payments thereon. In October, 1859, it was agreed between the parties, that the defendant should take, in full payment of the balance then due, a horse, harness and some clevises, which the plaintiff accordingly delivered to him, and the contract was receipted in full as follows: "Received of Jacob Hendricks one bay, four year old horse, in full of all demands on the within contract, be they more or less." The balance actually due at that time was $52.24; but the complaint alleges that the plaintiff supposed the amount to be about $150, and that Goodrich, "either by mistake or otherwise," left him so to suppose; and that "by mistake of fact he paid said Goodrich $150, by the delivery to him" of said horse, etc., "instead of the amount actually due."

The evidence produced at the trial tended to show that the value of the property which the plaintiff let the defendant have, was from $100

to $135; that the defendant knew at the time of the settlement, that there was not more than $53.00 due on the contract; that the plaintiff, in consequence of having forgotten one payment, of $100, supposed there was due about $150; that the defendant knew, at the time, of the plaintiff's mistake, and also knew that he valued the horse at $150. The plaintiff, on discovering his mistake, tendered the amount due on the contract in money, and demanded a return of the horse, which the defendant, who had not parted with the horse, refused. Verdict and judgment for the plaintiff, for $79.00.

COLE, J.[5] * * * We shall not attempt to notice many of the questions embraced in the instructions, and which were discussed on the argument. There is, however, one proposition of law underlying the case, and which is substantially raised by several of the instructions which were refused, that disposes of this appeal. It is this—to state it in the language of the counsel for the appellant, as used in his brief: —the respondent cannot have the privilege of affirming the contract so far as to make the appellant keep the horse in satisfaction of the amount due on the contract, and of disaffirming so as to recover the difference between the value put upon the horse and the amount due. A glance at the facts shows very clearly that this is what the respondent is seeking to do.

The action was brought to recover part of the value of a horse which the respondent had sold the appellant, in full payment of the amount unpaid on a land contract held by the former against the latter. The respondent bases his right to recover on the ground that there was a hundred dollars less due on the contract than he supposed when he sold the horse in satisfaction of it. He insists that the appellant was either under the same mistake as to the amount due, or that knowing the amount he fraudulently concealed or suppressed the real truth, and received property far in excess in value of the sum justly due him. In either case, it seems to us quite obvious that the respondent cannot treat the transaction as binding so far as the discharge of the land contract was concerned, and recover, in an action as for money had and received, the difference between the value put upon the horse and the amount due upon the contract. In other words, he is not at liberty to rescind the contract of exchange and sale in part, and affirm it as far as it may be advantageous or beneficial to him. If he wishes to repudiate the contract, he must do so as to the entire transaction. The rule is perfectly well settled, that when a party seeks to rescind a contract on the ground of fraud, he must do so in toto, for the purpose of restoring the party as far as possible to the condition in which he stood when the contract was made. This is a very familiar principle, and is perfectly controlling in our view of the case. On the other hand, does not the same rule apply, if the respondent seeks to avoid the transaction on the ground that it was entered into

[5] The statement of facts is abridged and a portion of the opinion is omitted.

under a mistake of the amount due on the contract? Can he be in any better condition to affirm the contract in part, and disaffirm in part, than he would be were he proceeding to avoid it on the ground of fraud? We cannot see that he is. And still the rule would not be controverted, that where the right to rescind springs from fraud, the defrauded party must rescind the entire contract. He is not permitted to enforce it so far as it is advantageous to him, and repudiate it as to the residue. For the same, if not stronger reasons, the respondent, seeking to set aside the transaction because it was entered into under a mistake as to the amount due on the land contract, must disaffirm it entire. We assume that the mistake was such as would enable him to avoid the entire transaction if he should seek to do so.

It is contended that in any event he would not have this right, unless the mistake as to the amount due was mutual. But upon this point we express no opinion. For, assuming that the law is otherwise, and that the transaction could be avoided on the ground that the respondent was mistaken as to the amount due upon the land contract, we still cannot see upon what principle he can insist that the appellant shall retain the property and pay him the excess in money. We certainly have no right to say that the appellant would not be injured by keeping the horse and paying the excess. He might not have wanted the horse nor have been willing to take it except under the circumstances he did. We therefore cannot assume that he would have purchased the property and paid in money the excess over and above the sum due him on the contract. It is very manifest that it cannot be either safely asserted or fairly assumed that the appellant would have done anything of the kind. His inducement for taking the horse at all might have been the precise reason that he had no money to pay, but was to receive it in satisfaction of the contract. The horse is claimed to be worth about one hundred and fifty dollars, while it is said the real amount due on the land contract was only about fifty dollars. Under such circumstances, can it be fairly assumed that the appellant would have given an hundred dollars for the horse and discharged the contract? If so, upon what ground can such an assumption be founded? It is readily seen that it might be a great hardship to compel the appellant to retain the horse and pay the excess. It is claimed that this cannot be so, because, it is said, the property was sold and delivered in payment of a debt due in money, and though the appellant may still have the horse, yet in contemplation of law the case is the same as if the respondent had actually paid one hundred and fifty dollars under a mistake that this sum was due.

We are referred to some authorities in support of this position, but an examination of them will show that they are inapplicable, for this reason: we are unable to say that the parties treated the horse as money, or that the appellant would have purchased it and paid one hundred and fifty dollars. He took the horse in satisfaction of the

contract. This is all that can be inferred from the transaction. It is impossible to say whether he would have paid one hundred and fifty or even one hundred dollars for the horse. For this reason the authorities do not apply. Now while the respondent is compelled to admit that the horse was taken in satisfaction of the amount due on the contract, he is still endeavoring to avoid the contract by saying that he was mistaken as to the amount which was due. In other words, he is attempting to avoid the contract in part and affirm it in part. This he clearly cannot do.

For these reasons the judgment of the circuit court must be reversed, and a new trial ordered.[6]

NORTON v. BOHART.

(Supreme Court of Missouri, Division No. 2, 1891. 105 Mo. 615, 16 S. W. 598.)

Appeal from Circuit Court, Caldwell County; J. M. Davis, Judge.

Action of money had and received to recover an overpayment of $2,000.00 alleged to have been made by mistake of fact.

The partnership of Guthrie & Norton, of which the plaintiff is the surviving partner and the administrator of the partnership estate, purchased from the defendant the assets and business of a bank, paying therefor $10,250 for the capital stock, a further sum of $1,500 for the furniture and fixtures, which had been paid for out of the profits, and the additional sum of $2,000 for the bank building, which had been paid for out of the capital. Guthrie & Norton, as plaintiff testified, supposed that they were to pay only the amount invested in the business, and they paid the $2,000 for the building through inadvertently overlooking the fact that the building had been paid for out of the capital of the bank.

The defendant testified that he sold the bank for $10,250, and the

[6] Contra: Johnson v. Saum (1904) 123 Iowa, 145, 98 N. W. 599, a case involving almost identical facts, where the court said: "May a creditor swell his claim against a debtor by adding to the account, either by fraud or mistake, an item of indebtedness which has once been fully paid, and insist upon keeping the advantage thus obtained over the debtor, who has, by oversight, or even by carelessness, paid such item a second time? The statement of the question is its own answer. Indeed, counsel do not deny that had the payment been made in money, and it was afterwards discovered that defendant had, by mistake, received more than was due him, an action would lie to recover the excess. Does the fact that defendant received a horse, instead of cash, call for the application of any different principle? It is, of course, correct that, if a party sees fit to accept a horse worth $50 in satisfaction of a debt of $500, he may do so, and both parties are bound by the transaction; and, vice versa, if a man with a horse worth $500 chooses to deliver it to a creditor in payment of a debt of $50, neither can repudiate such settlement because of the disparity between the debt paid and the value of the animal. But if A., having a just demand against B., receives full payment, and thereafter, through mutual mistake, or through the fraud of A. and the mistake of B., the same debt is paid a second time, in money or property, the right of B. to recover the money or value of the property would seem too clear for argument."

building for $2,000 additional, and that he would not have sold the property on the terms plaintiff insists he did.

The case was tried by the court, who found for the plaintiff, and entered judgment accordingly. The defendant alleged exceptions.

THOMAS, J.[7] * * * There is some controversy between the parties as to whether this is a suit in equity or an action at law. We think it clearly an action at law, for money had and received. 2 Chitty Con. (11th Am. Ed.) pp. 903, 928–932. The trial court so treated and tried it and in this no error was committed. * * *

Defendant asked and the court refused to declare the law as follows: "If the court shall believe, from all the testimony in the case, that the plaintiff agreed to pay the defendant $10,250 on account of the bank-stock, and $3,500 on account of the building, furniture, etc., and that plaintiff paid said amount in accordance with the terms of the agreement between the parties, then the finding of the court must be for the defendant, even though the court may believe, from all the evidence in the case, that the plaintiff was laboring under a mistake as to the stock of the bank representing its building, and even though the court may believe that plaintiff would not have agreed to pay the sums above specified if it had not been for the mistake he was laboring under."

If the court had given this instruction, and had then found the issues for the plaintiff, we would be able approximately to determine what facts the court did find; but its refusal of this instruction indicates, to our minds, that it ignored one fact essential to plaintiff's recovery. The issue between the parties was what the contract was,—not what form it took, but what it was in fact. The plaintiff testified that Guthrie & Norton expected to get the assets of the bank by the purchase of the stock, and that the bank building, having been bought with money of the bank, constituted a part of its assets, but that they paid for the stock, and then by mistake paid a further and additional sum of $2,000 for the bank building. The defendant testified that he sold the stock for $10,250, and the bank building for $2,000 additional, and he would not have sold this property on the terms the other parties to the transaction afterwards insisted he had sold it.

Here was a well-defined, clean-cut issue of fact, made not only by the pleadings, but by the evidence; but it is impossible for us to ascertain from the record what disposition the court below made of it. If the contract was as plaintiff claims and swears it was, he is entitled to recover; but if the contract, on the other hand, was what defendant claims and swears it was, or if he alone understood it that way, judgment ought to have been rendered for him in this action, even though Guthrie & Norton by mistake ignored and overlooked the fact that they paid for the bank building twice. If there was a mutual mistake, and

[7] The statement of facts is based on the syllabus and portions of the opinion are omitted.

plaintiff paid, by virtue thereof, $2,000, which he ought not to have paid, he is entitled to recover it in this form of action. Chit. Cont., supra; Insurance Co. v. Walsh, 18 Mo. 229; Koontz v. Bank, 51 Mo. 275; Morrow v. Surber, 97 Mo. 155, 11 S. W. 48; Mowatt v. Wright, 1 Wend. (N. Y.) 360, 19 Am. Dec. 508; Wheadon v. Olds, 20 Wend. (N. Y.) 174; Kelly v. Solari, 9 Mees. & W. 54.

This right of recovery, however, is based solely on the contract as it was entered into, in fact. The recovery of this sum, in case it was paid by mistake of both parties, puts the parties precisely where they intended to put, and did put, themselves by the contract as actually made. This works no wrong upon either party.

But suppose the mistake is unilateral. In this case, suppose plaintiff honestly believed he was to get the bank building by the purchase of the stock by the terms of the contract, and, overlooking this fact, through inadvertence paid an additional sum of $2,000 for the bank building, but that defendant honestly believed he was to get $10,250 for the stock, and, in addition thereto, $2,000 for the bank building. Could plaintiff recover in this form of action, under the facts in this case? We think not. There are cases in which it has been held, and rightfully held, too, that money paid by mistake might be recovered in an action at law, though the mistake was unilateral. But in such cases it will be found that the party who did not commit the mistake perpetrated a fraud on the other party by not divulging the fact as he knew it to exist, and the recovery of the money placed the parties in the position it was intended by both of them they should be placed, and where the very right of the transactions required they should be placed.[8] In such cases the court does not undertake to make a new contract for either party, or to reform the contract to conform to the understanding of one of the parties alone, but, on the contrary, simply puts both where they in fact agreed they would stand.

But what is the fact here? The defendant states in his answer, and swears to it on the trial, that the contract between him and Guthrie & Norton was that they were to pay him $10,250 for the stock, and $2,000 in addition thereto for the bank building, and, if they had not agreed to do this, he would not have sold the bank at all. The court below, by refusing defendant's instruction, evidently did not regard

[8] In Tucker v. Denton (1907) 32 Ky. Law Rep. 521, 106 S. W. 280, 15 L. R. A. (N. S.) 289, the plaintiff's father and mother contracted to sell the farm on which they lived to the defendants. The written memorandum of the contract of sale was incomplete and not binding on the vendors. The plaintiff not having seen the contract, and in the mistaken belief that the contract was binding (which the court held to be a mistake of fact) paid the defendants $800 to cancel the contract. The plaintiff having discovered that the contract was not enforceable against her parents, brought action to recover the money paid. The court held for the plaintiff, saying that, if the defendant believed that the contract was binding, it was a case of payment of money under a mutual mistake of a material fact, and that if the defendant knew that the contract was not binding, and concealed such fact from the plaintiff, then it was a case of fraud on the part of the defendant.

this theory of importance in the determination of the issues, provided the other contracting parties made a mistake, and paid $2,000 more than they thought they ought to have paid, or agreed to pay. This was error. This was the main issue in the case, and the court ought to have found what the contract was in fact, as understood by both parties. The plaintiff holds onto the property transferred to Guthrie & Norton by virtue of this contract, and, if the defendant's version of it be correct, then the court, by directing him to pay back $2,000 which he honestly believed he was getting by virtue of the contract, and without the reception of which he would not have sold the property at all, would be substantially making a contract for defendant, without his consent, to conform to what the plaintiff understood it to be. It requires no argument to prove that the court has no such power.

If Guthrie & Norton honestly believed they were, by the terms of the contract, to get the bank building by the purchase of the stock, and, through inadvertence, overlooked this fact, and by mistake paid $2,000 for the bank building in addition to what was paid for the stock, and the defendant honestly believed he was to get $10,250 for the stock, and $2,000 in addition thereto for the bank building, then plaintiff's only remedy was to rescind the contract, put the parties in statu quo by returning the property, and asking for a recovery of the whole amount paid. In such case, he cannot hold onto the property, and at the same time enforce different terms against the other party, to which that party never assented. This would be making defendant sell his property to plaintiff for $2,000 less than he thought he was to get, and $2,000 less than his contract, as he understood it, entitled him to.

The instruction above quoted, asked by defendant, and refused by the court, declared the law properly as far as it went. The instructions, to fully cover the issue made, ought to be framed in the hypothetical form, so as to have the jury find the following facts: (1) What the contract was, in fact. (2) If the parties did not understand it alike, what its terms were, as understood by them, respectively.

If the contract was in fact what Guthrie & Norton claimed it was, then the defendant ought to refund the sum of money in dispute. In that case Guthrie & Norton paid the $2,000 by mistake, and defendant knew at the time that he was getting that sum wrongfully. In other words, Guthrie & Norton made a mistake, and defendant perpetrated a fraud by receiving money to which he knew he was not entitled, and which he knew the other parties were paying through mistake.

If the contract was in fact what defendant claimed it was, of course plaintiff has no cause of action. Guthrie & Norton had a perfect right to buy the bank on such terms as they could get it. And, again, if the defendant honestly and in good faith believed that the contract was what he claimed it was, and Guthrie & Norton honestly and in good faith believed it was what they claimed it was, then they, if they were right, had a remedy, but it was not the remedy here pursued. Be-

fore the court would hear them in that case, they would have to put, or offer to put, the defendant in statu quo, i. e., return, or offer to return, to him the property, and ask for the repayment of the $13,750 paid for it. The court, if it found one party understood the contract one way, and the other party understood it a different way, could restore the property to the one, and the money paid to the other, and put both parties in statu quo. This is equity, and common sense as well. The conclusion we have reached is supported by the following authorities: Kerr, Fraud & M. 409; Bellows v. Stone, 14 N. H. 175; Mathews v. Kansas City, 80 Mo. 231; Irwin v. Wilson, 45 Ohio St. 426, 15 N. E. 209, 12 West. Rep. 873, and cases cited in note. * * *

For the error committed by the court below in not properly declaring the law, the judgment is reversed, and the cause remanded for new trial, in conformity to the views expressed herein. All concur.*

(B) Voluntary Payment and Compromise

BROWN v. McKINALLY.

(Nisi Prius, before Lord Kenyon, C. J., 1795. 1 Esp. 279.)

Assumpsit for money had and received. Plea of the general issue.

The plaintiff and defendant being in the same line of business, entered into an agreement, by which the defendant agreed to sell the plaintiff all his old iron, except bushel-iron, which was of an inferior quality, at £9. per ton.

The iron he delivered was mixed iron, of an inferior value, being part bushel-iron, and charged the full value of the best sort; the plaintiff objecting to the charge, the now defendant brought an action for it. The plaintiff paid the full demand so made on him, at the same time telling the defendant, that he did it without prejudice; and meant to bring an action to recover back the overplus so paid. This action was brought for that purpose.

When the case was opened by the plaintiff's counsel, LORD KENYON said, that such an action could not be maintained. That to allow it, would be to try every such question twice; for that the same legal ground that would intitle the plaintiff to recover in the present action, would have been a good defence to the action brought against him by the present defendant; at which time and in which manner he should have proceeded: that money paid by mistake was recoverable in assumpsit; but here it was paid voluntarily, and so could not be recovered under the circumstances of this case.

*Compare Pickslay v. Starr (1896) 149 N. Y. 432, 44 N. E. 163, 32 L. R. A. 703, 52 Am. St. Rep. 740, briefly stated in note, page 432, infra.

WINDBIEL v. CARROLL.

(Supreme Court of New York, General Term, 1878. 16 Hun, 101.)

Appeal from a judgment in favor of the defendant, entered upon a nonsuit directed at the Circuit.

Xavier Misselbeck and Mary, his wife, executed and delivered to Davis L. Carroll, defendants' testator, their bond conditioned to pay the sum of $1,200, with their mortgage accompanying the same. Thereafter Xavier and Mary conveyed said real estate to Charles Windbiel, this plaintiff, subject to the lien of this mortgage, he assuming the payment of the same. Both Misselbeck and the plaintiff had made payments on said bond before such conveyance to Windbiel. On June 10, 1876, the plaintiff paid the balance claimed by the testator, Dr. Carroll, seven hundred and ten dollars and some cents. At that time plaintiff claimed there had been paid upon such bond and mortgage two sums which had not been credited thereon, one of $90.30 and the other of $164.66, together $254.96. And to recover said two sums so alleged to have been over-paid, this action was brought. On the trial, plaintiff produced a receipt for $164.66, given by Davis L. Carroll to Xavier Misselbeck, which amount was not allowed to the plaintiff when he made the above-mentioned payment on the bond and mortgage.

LEARNED, P. J. When the plaintiff paid up the mortgage to Dr. Carroll, he "claimed it was not right and that there was not so much due." He claimed that there had been an over-payment of $200 more than the doctor had credited him on the bond and mortgage. He said that he would pay the mortgage and would commence an action against the doctor to recover it back. There was a dispute between the plaintiff and the doctor about the amount due. And the plaintiff, when he paid the bond and mortgage, told the doctor that he would ascertain whether he had overpaid him, and if he had taken out of him more than was due, he would sue him.

This is the testimony of the plaintiff's own witness, and it is not contradicted. Two or three days afterwards the plaintiff commenced this action. The plaintiff, therefore, when he paid the bond and mortgage, knew (or believed) that he was paying more than was owing. The very fact on which he now seeks to recover was known to him and insisted upon by him at that time, and he made the payment with the intention of suing to recover part of it back again. What he has since discovered (as he claims) is not the fact that $200 more than was credited had been paid, but only the means of proving that fact.

Ignorance of a fact is one thing; ignorance of the means of proving a fact is another. When money voluntarily paid is recovered back, it is because there was a mistake as to some fact. But here the plaintiff was not mistaken as to the fact. Only at the time he did not know how

to prove it. The subsequent discovery of evidence to prove a fact, known to the party when he makes the payment, cannot authorize a recovery back of the money. Such a principle would be most dangerous.

I think the judgment should be affirmed, with costs.

BOCKES, J., concurred. BOARDMAN, J., dissented.

Judgment affirmed, with costs.[9]

NEW YORK LIFE INS. CO. v. CHITTENDEN & EASTMAN.

(Supreme Court of Iowa, 1907. 134 Iowa, 613, 112 N. W. 96, 11 L. R. A. [N. S.] 233, 120 Am. St. Rep. 444, 13 Ann. Cas. 408.)

Appeal from District Court, Des Moines County; W. S. Withrow, Judge.

Action to recover back the money paid on a life insurance policy under mistake as to the death of the insured. On trial without a jury the court rendered a judgment for defendants, from which plaintiffs appeal.

McCLAIN, J.[10] Two policies were issued by plaintiff to one Jarvis on the 9th day of September, 1889, each for $1,350, payable on his

[9] In National Life Insurance Co. v. Jones (1873) 1 Thomp. & C. 466 (affirmed on opinion below, 59 N. Y. 649 [1874]), the plaintiff company had issued a policy of insurance upon the life of one Hiram J. Mumford, payable to his wife. Upon the death of the insured the officers of the plaintiff suspected that the policy had been obtained through false and fraudulent representations as to the health of the insured contained in his application for the policy, and as a result of an investigation such officers came to the conclusion that a defense existed to the claim upon said policy. Nevertheless the company paid the claim in full, partly because of the evil effect which a resistance of the claim would have upon the reputation of the company in the event of an unsuccessful resistance, and partly from some expected benefit which in some general way might result to the company from prompt payment. The present action was brought to recover the sum so paid upon the ground that the policy was obtained through fraud as above stated. The court held for defendant, saying: "The rule by which a party is enabled to recover back money paid under a mistake of fact does not authorize him to rescind a payment merely because he has changed his mind in regard to a matter of policy, or because he has come to a better position, so far as the facilities and probable result of a defense are concerned, but is based upon the idea of a bona fide and controlling belief in the existence of given facts, under the influence of which he has been induced to make payment. Such, according to the findings and the evidence, is not this case."

In Guild v. Baldridge (1852) 32 Tenn. (2 Swan) 295, it was held that a recovery of money paid under mutual mistake of fact cannot be resisted "on the ground that the plaintiff, at the time of payment, may have entertained and expressed a vague belief, resting on no evidence and amounting to nothing like conviction or moral certainty, that he had previously paid the debt. The authorities cited require that he shall have had knowledge of the facts, and that term must be understood in its ordinary sense."

If at the time of payment defendant agreed to refund any sum paid in excess of what was actually due, plaintiff may recover such excess, even though it was voluntarily paid by him. Steere v. Oakley (1898) 186 Pa. 582, 40 Atl. 815; Juneau v. Stunkle (1889) 40 Kan. 756, 20 Pac. 473.

[10] A portion of the opinion, discussing another point, is omitted.

death to his wife, or, if not living, to his children, or, if no children should survive, then to the executors, administrators, or assigns of the insured. Prior to the 25th day of December, 1894, the wife of the insured had died, and he was without children, and he had assigned the policy of the defendants Chittenden & Eastman, a partnership to whom he was indebted, and forwarded a copy of this assignment to the plaintiff. It appears, also, that prior to the assignment to Chittenden & Eastman there had been another assignment by way of security to the Iowa State Savings Bank which had not been forwarded to the plaintiff, and was not known to it when the assignment to Chittenden & Eastman was received and recognized. On the last above date Jarvis, the insured, disappeared from his home in Burlington, and was not heard of for more than seven years.

At the April term, 1902, of the district court of Des Moines county, the Iowa State Savings Bank applied as creditors for the appointment of an administrator for the estate of Jarvis, alleging his disappearance, and that his whereabouts had continued unknown to his friends and the members of his family, and that he had not been heard from. Proper proceedings were had, under which defendant Waldeck was appointed administrator of the estate of Jarvis, and a claim was then made jointly by Waldeck as administrator and Chittenden & Eastman as assignees for payment of the policies held by Jarvis in the plaintiff company; and proofs of death were furnished by Waldeck, in which were the following statements: "(7) Date of death: During Christmas week, 1894. (8) Place of death: The assured disappeared, and since that date he has not been heard from. There was nothing in his family or business relations to explain his absence. His brother at the time of his disappearance was a resident of Burlington, Iowa, and has ever since continued to reside there and the most pleasant relations existed between them. * * * (10) In what capacity, or by what title, to you claim this insurance? As administrator of the estate of the assured."

Negotiations were had between attorneys representing the administrator and an agent of the insurance company in which it was insisted for the administrator that the insurance money was due and payable, and that, unless it was paid, suit would be instituted on the policies. Subsequently two drafts for the amount specified in the policies, payable jointly to Chittenden & Eastman, assignees, and C. W. Waldeck, administrator, were tendered to the attorneys for the administrator by the agent of the plaintiff, with the condition that the administrator and assignees should give a bond of indemnity to the company for the return of the money in case it should be subsequently discovered that Jarvis was not dead at the time of this settlement. The attorneys for the administrator refused in behalf of their client to furnish such bond, and thereupon the drafts were delivered without further insistence upon this condition. The proceeds of the

drafts were paid in part to the Iowa State Savings Bank, and in part to Chittenden & Eastman.

It is conceded that after this payment and the distribution of the proceeds thereof by the administrator Jarvis was alive, and, on the discovery of the fact in April, 1905, the company tendered back the policies of insurance and demanded the return of the money paid, and on refusal this suit was instituted. As the payment of the insurance was by the drafts made jointly to Chittenden & Eastman and Waldeck, this suit is no doubt properly instituted against them jointly, although the money has been in part distributed to the Iowa State Savings Bank, which is not a party to this action; but, as our conclusions in the case are not dependent on the extent of the liability, respectively, of Waldeck and Chittenden & Eastman, we shall give that subject no further consideration.

1. If Waldeck as administrator was entitled to maintain a suit against plaintiff under the authority given him in the administration proceeding and to recover the insurance money which was in fact paid, plaintiff had no right to recovery as against him individually, for he had done what by law he was authorized to do, and could not be held individually liable. The first question, then, as we think, is whether the proceedings for administration on the estate of Jarvis were valid. It seems to be conclusively settled by adjudications that a probate court acquires no jurisdiction by proceeding to administer on the estate of a person on the ground that he is dead if in fact he is alive, and such proceedings are entirely invalid, and any judgments or orders made in pursuance thereof, and any action taken thereunder, are absolutely void as against the person who is erroneously adjudged to be dead. Without citing the many authorities supporting this proposition, it is sufficient to say that any such proceeding, if sustained, would result in depriving the person erroneously adjudged to be dead of his property without due process of law. Scott v. McNeal, 154 U. S. 34, 14 Sup. Ct. 1108, 38 L. Ed. 896.

But, in the exercise of its jurisdiction over property within the state, it may be provided by the legislature that after the absence of the owner unheard of for a specified period such property may be administered upon in the same form of proceeding as is provided for administration upon the property of a person deceased, and such administration will be valid as against the absentee and all persons interested, although he is in fact not dead. Cunnius v. Reading School District, 198 U. S. 458, 25 Sup. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121. Section 3307 of our Code provides for such an administration on the estate of one who has absented himself from the state and concealed his whereabouts from his family for a period of seven years, and under the decision last above cited we have no doubt that this section is constitutional and provides for a proceeding which may properly be resorted to in such cases, and which is conclusive on the absentee and those claiming under him. The administration granted as

to the property of Jarvis was in accordance with the provisions of this section, and we think it was valid.

Waldeck as administrator had the right, therefore, to receive from the plaintiff the proceeds of the policies on Jarvis' life so far as such proceeds were payable to his administrator, and, as Chittenden & Eastman assented to such payment and to the distribution of the proceeds by Waldeck as administrator, there was a final settlement under the policies, which, if Jarvis had been in fact dead, would have been binding on all parties. It may be conceded that the policies did not mature simply on the granting of administration on the estate of Jarvis as an absentee. The conditions of the policies were that the sums named therein should be paid on Jarvis' death, and, as already indicated, the administration was not conclusive as to the fact of his death, but only as to the fact of his absence, and the concealment of his whereabouts from his family for seven years. But the facts which justified the administration would also as evidence have established a right of action on the policies by the administrator and the assignees to recover the insurance money, for those facts would have been sufficient evidence of death to sustain a judgment based on that fact. The plaintiff company was thereupon brought face to face with the question whether it would pay the amounts of the policies or stand suit thereon, and question the fact of the death of Jarvis.

It may further be suggested that the obligation of the plaintiff under its policies was to pay the amount named therein to the proper beneficiary within 60 days after due notice and satisfactory proof of death, and that proof of death stating the facts which, if established, would show the liability of the company was furnished, and no objection thereto on the part of the company was made. Under these conditions, and for the purpose of avoiding an action on the policies, the plaintiff company elected to pay over the amount thereof to the persons entitled to receive the insurance money if Jarvis were in fact dead, and this compromise and settlement of a claim based on the assertion of his death was, we think, binding and conclusive on the company. Had a judgment been secured in an action by the administrator with authority to represent the rights of all persons interested in the proceeds of the policies, such judgment would have been conclusive as to the death of Jarvis, and the company could not, after paying the amount of such judgment, have recovered back the money paid on discovering that the essential fact in issue in the case, to wit, the death of Jarvis, had been erroneously adjudicated. The judgment would have been conclusive as to that fact. Therefore we think that a settlement by which the money was paid for the purpose of avoiding a suit in which such a judgment might have been rendered is also conclusive, and that plaintiff cannot now recover back the money thus paid.

In a case quite similar in its essential facts to the one now before us the Court of Appeals of New York held that the arrangement for

the payment of the amount of the policies entered into in view of the assumed death of the assured as indicated by his absence unheard of for more than seven years was binding after it had been ascertained that he was still living; such arrangement having been made with regard to the chances of success of the claimant under the policy at the time when the insured was thought to be dead. In that case, as in this, "clearly but one thing was dealt with or could be in the agreement of settlement, to wit, the possibility that the insured should prove to be alive." Sears v. Grand Lodge, 163 N. Y. 374, 57 N. E. 618, 50 L. R. A. 204. In the case before us there was no compromise, it is true, as to the amount to be paid; but there was a compromise on the question whether anything was payable, and for the purpose of avoiding litigation the plaintiff elected to make payment. A voluntary payment is usually conclusive, and cannot be recovered back. Manning v. Poling, 114 Iowa, 20, 83 N. W. 895, 86 N. W. 30; James v. Dalbey, 107 Iowa, 463, 78 N. W. 51; Davenport & St. P. R. Co. v. Rogers, 39 Iowa, 298; Bailey v. Paullina, 69 Iowa, 463, 29 N. W. 418; Baldwin v. Foss, 71 Iowa, 389, 32 N. W. 389; Lyman v. Lauderbaugh, 75 Iowa, 481, 39 N. W. 812; Weaver v. Stacey, 93 Iowa, 683, 62 N. W. 22; Windbiel v. Carroll, 16 Hun (N. Y.) 101; National Life Ins. Co. v. Jones, 1 Thomp. & C. (N. Y.) 466.

2. Counsel for appellant insist that this payment was one made under a mutual mistake of fact, and that in accordance with the well-recognized equitable principle money thus paid may be recovered back. The rule thus invoked is not applicable, however, where under an assumption of fact known to both parties to be doubtful there has been a voluntary payment in extinguishment of a claim.

The principle is thus stated in 1 Pomeroy, Equity Jurisprudence (2d Ed.) § 855: "Where parties have entered into a contract or arrangement based upon uncertain or contingent events purposely as a compromise of a doubtful claim arising from them, * * * and there is * * * an absence of bad faith, violation of confidence, misrepresentation, concealment, and other inequitable conduct, * * * if the facts upon which such agreement or transaction was founded * * * turned out very differently from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to a matter of fact and not of law, is not such a mistake within the meaning of the equitable doctrine as entitles the disappointed party to any relief. * * * In such classes of agreements and transactions the parties are supposed to calculate the chances, and they certainly assume the risks."

And at another place in the same work (section 849) the author uses this language: "It should be carefully observed that this rule (allowing recovery of money paid under mistake) has no application to compromises where doubts have arisen as to the rights of the parties, and they have intentionally entered into an arrangement for the purpose of

compromising and settling those doubts. Such compromises, whether involving mistakes of law or fact, are governed by special consideration."

The foregoing quotations are made part of the opinion in Sears v. Grand Lodge, 163 N. Y. 374, 57 N. E. 618, 50 L. R. A. 204, as applicable to a case very similar to the one before us. In Riegel v. American Life Insurance Co., 140 Pa. 193, 21 Atl. 392, 11 L. R. A. 857, 23 Am. St. Rep. 225, and on a subsequent appeal (153 Pa. 134, 25 Atl. 1070, 19 L. R. A. 166), it was decided that the holder of a policy accepting its surrender value under the assumption that the assured was still alive might, on proving that in fact the insured had already died, recover the balance of the face of the policy which had matured by the death of the assured without the knowledge of either party. But it is evident that, under these circumstances, there was a mistake as to a fact not within the contemplation of either party in entering into the arrangement.

In the case before us the question whether Jarvis was dead was distinctly within the contemplation of both parties, for it was expressly recited in the proof of loss that he had been absent for more than seven years, and had not been heard of within that time. The only question of controversy between the parties in determining whether or not the insurance money should be paid was as to whether Jarvis was dead, and the plaintiff conceded its liability by voluntarily paying the claim. In the absence of fraud or concealment, the means of knowledge as to the fact in controversy being equally accessible to each party, the payment is conclusive. Eagan v. Ætna F. & M. Ins. Co., 10 W. Va. 583; Mutual Life Ins. Co. v. Wager, 27 Barb. (N. Y.) 354. * * *

The judgment of the trial court is therefore affirmed.*

*In Mowatt v. Wright (1828) 1 Wend. (N. Y.) 355, 19 Am. Dec. 508, the defendant Mrs. Wright, a widow, had brought suit to establish her dower in certain lands which had been conveyed by her husband during coverture. Mrs. Wright had in fact released her dower but had forgotten that fact. The plaintiff, a subsequent grantee of the premises, thinking that Mrs. Wright had released her dower, but being unable to produce evidence of that fact, paid her $1,000 in full settlement of her claim. The plaintiff subsequently found the original document executed by Mrs. Wright releasing her dower, and now sues to recover back $1,000 paid. In the course of his opinion Savage, C. J., said: "In the present case, it now appears that the defendant had, in fact, no right to the money paid by the plaintiffs; but it was paid upon a claim of right which was honestly made by her; and the plaintiffs here, who were virtually defendants in the dower suits, acted under as full a knowledge of the facts as the demandant. She, in truth, believed that she had never executed a deed; but the plaintiffs acted under the belief, as testified by the witnesses, that there was such a deed in existence, but for reasons which are stated, they thought that the payment of the $1,000 was the shortest and cheapest way of settling the dispute. This sum of money, then, was given to Mrs. Wright to quiet the claim, in the language of Mr. Justice Best. She had a right to consider it her own without dispute. She had probably spent it; 'and it would be most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter and recover back the money.' I

McARTHUR v. LUCE.

(Supreme Court of Michigan, 1880. 43 Mich. 435, 5 N. W. 451, 38 Am. Rep. 204.)

Error to Alpena.

MARSTON, C. J. Luce & Co., in demanding that McArthur pay them for logs cut, as they supposed, upon their land, acted in entire good faith. They had a survey made, and according thereto the plaintiff had cut logs over the line. When the claim was made upon the plaintiff he employed a surveyor and they went upon the land, and plaintiff then became satisfied that he had cut and taken logs from off defendants' land, and authorized a settlement to be made, which was done. This was in 1871, and all parties rested in the belief that a correct settlement had been made until some time in 1875, when a new survey established the fact that no logs had been cut upon defendants' land, and this action was brought to recover back the moneys paid, upon the claim of having been paid under a mistake of fact.

Where a claim is thus made against another, who, not relying upon the representations of the claimant, has the opportunity to and does investigate the facts, and thereupon becomes satisfied that the claim made is correct, and adjusts and pays the same, I think such settlement and payment should be considered as final. If not, it is very difficult to say when such disputed questions could be considered as finally settled, or litigation ended. In the settlement of disputed questions, where both parties have equal opportunity and facilities for ascertaining the facts, it becomes incumbent on each to then make his investigation, and not carelessly settle, trusting to future investigation to show a mistake of facts and enable him to recover back the amount paid. One course encourages carelessness and breeds litigation after witnesses have passed beyond the reach of the parties; the other encourages parties in ascertaining what the facts and circumstances actually are while the transaction is fresh in the minds of all, and a final and peaceful settlement thereof. Detroit Advertiser & Tribune Co. v. Detroit, 43 Mich. 116, 5 N. W. 72; and County of Wayne v. Randall, 43 Mich. 137, 5 N. W. 75.

The judgment must be affirmed, with costs.[11]

cannot consider this as a case of mistake of fact or of law. Mrs. Wright brought suit for a claim which she thought well founded. The defendants believed there was a defence, but they could not produce the evidence of it, like the case of the lost receipt: they, therefore, paid a sum of money, as the easiest and cheapest way of settling the claim. It is a voluntary payment, though they would not have made it, could they have produced the evidence of their title at the time. It is now too late to call the settlement in question. I am of opinion that the motion to set aside the verdict should be denied."

[11] Contra: Turner Falls Lumber Co. v. Burns (1899) 71 Vt. 354, 45 Atl. 896.

WHEADON v. OLDS.

(Supreme Court of Judicature of New York, 1838. 20 Wend. 174.)

This was an action of assumpsit, tried at the Onondaga circuit in March, 1836, before the Hon. Daniel Moseley, one of the circuit judges.

The defendant agreed to sell to the plaintiff from sixteen to twenty hundred bushels of oats, at forty-nine cents per bushel. The delivery of the oats was commenced by removing them from a store-house to a canal boat; tallies were kept, and when the tallies amounted to 500, it was proposed to guess at the remainder; and after a while it was agreed between the parties to call the whole quantity 1,900 bushels, and the plaintiff accordingly paid for that quantity at the stipulated price. When the oats came to be measured it was ascertained that there were only 1,488 bushels delivered. It was then found that the mistake had happened by both parties assuming as the basis of the negotiation, fixing the quantity of 1,900 bushels, that 500 bushels had been loaded in the boat at the time when they undertook to guess at the residue, whereas in fact only 250 bushels had been loaded—the tallies representing half bushels and not bushels, and that the parties supposed that the quantity loaded was not a quarter of the whole quantity. The vendor refusing to refund a portion of the money received by him, this action was brought by the purchaser, who declared for money had and received, and delivered a bill of particulars stating the contract between the parties that the oats were delivered, and "that in measuring said oats" a mistake was made, whereby the plaintiff paid the defendant "for about 300 bushels more oats than he received." The defendant proved by one witness that the plaintiff said he would take the oats at 1,900 bushels, hit or miss, and by another that he had acknowledged that he took the oats at that quantity at his own risk. He further proved that before the boat left the store-house, on dissatisfaction being expressed by a friend of the plaintiff who was to advance the money for him, as to the mode of ascertaining the quantity, that he told them that if they were dissatisfied with the quantity, to put the oats back into the store-house, and pay him for his trouble.

When the evidence was closed the counsel for the defendant stated that he should not question the fact that the parties were mutually in error in supposing that 500 bushels of oats had been put on board when in fact only 250 bushels had been put on board at the time of the bargain in reference to the quantity, but insisted that the bargain was obligatory upon the plaintiff, and that therefore he was not entitled to recover. He also insisted that the proof varied from the bill of particulars; and thirdly, that at all events the plaintiff was only entitled to recover for the deficiency of 250 bushels in the first estimated quantity. The judge charged the jury that if they should find that the parties at the time of the bargain in reference to the 1,900

bushels were in error as to the quantity measured, and supposed that 500 bushels had been measured when in fact the quantity measured was only 250 bushels, and had based the bargain upon that supposition, then that the plaintiff was entitled to recover for the deficiency of the 1,900 bushels. The jury found a verdict for the plaintiff for $190. The defendant moves for a new trial.

COWEN, J. The objection at variance from the bill of particulars was too general. It should have been stated whether it was in quantity, or sum, or in what else.

The mistake as proved went not only to the quantity measured, but the jury found, under the charge of the judge, that relatively it influenced the entire agreement to take the oats at 1,900 bushels. One ingredient of estimating the residue, as talked of, was the assuming that the supposed 500 bushels was one-fourth of the pile, which would operate unfavorably to the plaintiff, if he reasoned from the size of the smaller to that of the larger pile. Here was an admitted error, which certainly influenced the conduct of the plaintiff to the extent of 250 bushels; and, as we must take it on the finding of the jury, to the full amount which the oats came short of the 1,900 bushels. All the excess of payment arose from a count of half bushels as bushels. And the only question in the least open is, whether an agreement, based on that mistake, to accept the oats at the plaintiff's own risk of the quantity, shall conclude him.

The mistake which entitles to this action is thus stated by the late Chief Justice Savage from the civil law: "An error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist which really does not exist." Mowatt v. Wright, 1 Wend. 360, 19 Am. Dec. 508. He cites the words of 2 Ev. Poth. 437. And see 1 Dom. 248, B. 1, tit. 18, § 1, pl. 1. In judging of its legal effect, we must look "to the regard which the contractors have had to the fact which appeared to them to be true." 1 Dom. 250, B. 1, tit. 18, § 1, pl. 11. And when we see that the agreement is the result of such a regard, or, as the judge said to the jury, is based upon it, I am not aware of any case or dictum, that, because part of the agreement is to take at the party's own risk, or as the parties expressed it here, hit or miss, it therefore forms an exception to the general rule. The agreement to risk was, pro tanto, annulled by the error. The money was paid under a contract void for so much as the oats fell short of 1,900 bushels. The effect would have been very different, had the truth been known to the plaintiff. See Domat as before cited. The foundation of the arrangement to take at the plaintiff's risk, was a misreckoning, one number being put instead of another, "which," says Domat, pl. 12, "is a kind of error in fact different from all other errors, in that it is always repaired."

The motion for a new trial is denied.[12]

[12] "The liability of a putative father for the support of his bastard child is created wholly by statute (he not being liable at common law), and the

(C) Mistake as to Collateral Matters

AIKEN v. SHORT.

(Court of Exchequer, 1856. 1 Hurl. & N. 210.)

Action for money had and received. Plea, never indebted.

At the trial before Platt, B., at the Middlesex sittings, in last Hilary Term, the following facts were proved: The defendant was the widow and sole executrix of Francis Short, who died in 1853. One Edwin Carter had made a will, dated February, 1846, by which he gave his property equally amongst his eight brothers and sisters, of whom George Carter was one. This will was proved after his death, which took place in 1847, by John Carter the younger. George Carter being largely indebted to Stuckey's Banking Company, by deed dated the 15th January, 1855, conveyed to the Banking Company his one-eighth share in the property of Edwin Carter, to which he professed to be entitled under this will, subject to the charges upon it. George Carter was at that time indebted to the defendant, as executrix of Francis Short, in the sum of £200., which was secured by an equitable mortgage of the property devised to him by Edwin Carter's will, and by the joint and several bond of George Carter, John Carter, and Charles Carter, dated October, 1850. The equitable charge was recited in the deed of the 15th January, and at the time of the execution of that deed it was agreed, as between George Carter and the Bank, that the Bank should pay off this sum of £200. and interest. In May, 1855, the Bank made arrangements to sell the property. Before the execution of the conveyance one Richardson, acting as attorney for the defendant, applied to the Bank for payment of the £200. and interest, stating that he had applied to George Carter, who had referred him to the Bank. The

remedy there prescribed must be pursued. The statute authorizes a compromise and arrangement with the putative father relative to the support of such child. The compromise under the statute is merely a mode of getting indemnity on the part of the county for the support of the bastard. * * * The plaintiff was charged with being the father of a child likely to be born a bastard, of which Louisa Hehr was alleged to be pregnant. Both the plaintiff and defendant acted upon the erroneous assumption that she was pregnant, and they compromised relative to the support of the child that, it was supposed, would be born a bastard and become chargeable to the county. * * * The fact as to who was the father of the child may have been waived by the compromise, but not the vital fact which gave it all its force and without the existence of which the superintendent had no power to act, viz., the pregnancy of Louisa Hehr. There was no disagreement or compromise between the plaintiff and the defendant as to the fact of pregnancy. They both believed and acted upon the assumption that she was pregnant, and it turns out that they were both mistaken. As there was no pregnancy, the county has not been put to any expense, and never can be, and as the plaintiff paid his money to indemnify the county under a mistake of fact, I think he was entitled to maintain this action. It has been repeatedly held, that when money was paid under a mistake which there was no ground to claim in conscience, the party may recover back." Rheel v. Hicks (1862) 25 N. Y. 289.

But see Kowalke v. Milwaukee Electric Railway & Light Co. (1899) 103 Wis. 472, 79 N. W. 762, 74 Am. St. Rep. 877.

Bank accordingly, through their attorney, paid to the defendant the sum of £226. 16s. 6d. The bond and instrument of mortgage were handed over by the defendant to the Bank, and they took a receipt for the money due on the bond and mortgage. In August, 1855, John Carter produced a will of Edwin Carter, dated April, 1846, which appeared to be the true last will of Edwin Carter. This will, the existence of which had been kept secret by the Carters, had been prepared in the office of Francis Short, the defendant's testator, and was attested by him. Under this will George Carter took only an annuity of £100., which ceased upon his making any assignment. The Bank then applied to the defendant to refund the £226. 16s. 6d. previously paid by them to her, and on her refusal to repay the money brought the present action to recover it back. Upon these facts, the learned Judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for her. The defendant obtained a rule nisi.

BRAMWELL, B.[13] In order to entitle a person to recover back money paid under a mistake of fact, the mistake must be as to a fact which, if true, would make the person paying liable to pay the money; not where, if true, it would merely make it desirable that he should pay the money. Here, if the fact was true, the bankers were at liberty to pay or not, as they pleased. But relying on the belief that the defendant had a valid security, they, having a subsequent legal mortgage, chose to pay off the defendant's charge. It is impossible to say that this case falls within the rule. The mistake of fact was, that the Bank thought that they could sell the estate for a better price. It is true that if the plaintiff could recover back this money from the defendant, there would be no difficulty in the way of the defendant suing Carter. In Pritchard v. Hitchcock, 6 M. & G. 151, a creditor was held to be at liberty to sue upon a guarantee of bills, though the bills had been in fact paid, but the money afterwards recovered back by the assignees of the acceptor, as having been paid by way of fraudulent preference. But that does not show that the plaintiffs can maintain this action, and I am of opinion they cannot, having voluntarily parted with their money to purchase that which the defendant had to sell, though no doubt it turned out to be different to, and of less value than, what they expected.

Rule absolute.[14]

[13] The concurring opinions of Pollock, C. B., and Platt, B., are omitted. The former characterized the situation as follows: "They [the plaintiffs] should have taken care not to have paid over the money to get a valueless security; but the defendant has nothing to do with their mistake."

[14] In Harris v. Lloyd (1839) 5 M. & W. 432, the plaintiffs were assignees for the benefit of the creditors of one Carter, and to save property for the creditors they paid defendant, the sheriff, the amount of an execution levied on the goods of Carter. It subsequently came to light that Carter had committed an act of bankruptcy prior to the assignment for creditors to the plaintiffs, whereupon they brought action for money had and received to recover back the money so paid to the sheriff "as having been paid under a mistake of fact, they not having at the time had any knowledge of the act of bankruptcy." A nonsuit was upheld. In the course of his opinion, Lord Abinger, C. B., said: "The short answer, however, to the action is that the money was

LANGEVIN v. CITY OF ST. PAUL.

(Supreme Court of Minnesota, 1892. 49 Minn. 189, 51 N. W. 817, 15 L. R. A. 766.)

Appeal by Edward Langevin, now deceased, from orders of the District Court of Ramsey County, Kerr, J., made January 23, 1890, sustaining demurrers to his complaint.

DICKINSON, J.[15] The defendants demurred separately to the complaint. The demurrers were sustained, and the plaintiff appealed. Lots 3, 4, and 5, in block 5, of Bazille & Robert's addition to West St. Paul, were contiguous lots fronting east on Custer street, lot 5 being south of lots 3 and 4. Fairfield avenue ran along the south side of lot 5. The length of that lot along Fairfield avenue was 150 feet. The plaintiff's intestate owned all of the block excepting lot 5.[16] In 1886, for the improvement of Fairfield avenue, two separate assessments were made upon lots 3, 4, and 5, lots 3 and 4 being included in the assessment by reason of the erroneous belief that they, as well as lot 5, fronted upon Fairfield avenue. The assessments not being paid, judgments therefor were duly rendered against the three lots jointly in the years 1886 and 1887, respectively, and thereupon the property was sold, as provided by law, to certain private parties. For reasons stated in the complaint, the intestate did not know that any of these proceedings affected the lots owned by him until after the judgment sale.

In May, 1889, the intestate, acting through an agent, redeemed the three lots from such sales, paying to the treasurer of the city for that purpose the sum of $1,728.10. When this redemption was made, the agent of the intestate and the city treasurer supposed that lot 5 belonged to the intestate, and that all of the lots fronted on Fairfield avenue, and hence were liable to be so assessed. On learning the facts, the intestate demanded of the city treasurer a return of the money so paid for redemption. Such repayment was refused, for the alleged reason that the treasurer had paid the money to the persons who had purchased at the sales from which such redemption was made.

The complaint shows no right to recover against the city. Upon the facts stated, the judgment was not invalid. No defect or irregularity in the proceedings is alleged, unless the mistake as to the situation of the property is to be excepted. Indeed, it is expressly averred that the judgment was duly rendered. The fact that the plaintiff's two lots did not abut on the street for the grading of which they were assessed did not affect the jurisdiction of the court or the validity of the judg-

not paid under a mistake of fact but upon a speculation, the failure of which cannot entitle the plaintiffs to recover it back." Alderson, B., said: "This is money paid, not under a mistake, but under a bargain. True, it turns out to be a bad bargain; but that will not affect its validity."

[15] The statement of facts is omitted.

[16] Lot 5 was owned by one Wollam, since deceased. The defendant Kipp was Wollam's administrator.

ment. They were liable to assessment as property which might be deemed benefited by the improvement, (Sp. Laws, 1874, c. 1, subc. 7, §§ 3, 14, 23, 26; Comp. Charter 1884, §§ 130, 139, 159, 162;) and even if there was a mistake as to the fact, in the proceedings preliminary to the judgment, the judgment was valid, (Dousman v. City of St. Paul, 23 Minn. 394.) The assessments were merged in the judgment, and whether they were properly or erroneously made is not now to be considered. The appellant cites a provision of the charter relating to sidewalks which has no application to the case before us. If, upon the facts stated, the action is maintainable against the city, it is as in assumpsit for money had and received; and so the plaintiff treats the case, resting the right of recovery upon the alleged mutual mistake of fact. But it is not maintainable on that ground. To justify a recovery in such an action, the money must have been received under such circumstances that, in equity and good conscience, the defendant ought not to retain it. The mistake, where that is the foundation of the action, must relate to a fact which is material, essential to the transaction between the parties. A payment made under the influence of a mistake, concerning a fact which, even if it were as it is supposed to be, would create no legal obligation, but merely operate as an inducement upon the mind of the party paying the money, the other party being without fault, would not justify a recovery as for money had and received. Aiken v. Short, 1 Hurl. & N. 210; Leake, Cont. 103. See, also, Chambers v. Miller, 13 C. B. (N. S.) 125.

The city was entitled to receive the money for redemption of the property, if any one having the legal right to redeem should elect to do so. It was not only legally authorized, but required, to receive the money, and neither its authority nor obligation was in any manner affected by the fact concerning which a mistake is alleged. It made no difference to it whether the plaintiff owned lot 5 or not, nor whether or not lots 3 and 4, which the plaintiff did own, fronted on the street improved. Such facts were wholly immaterial, so far as its right and duty to receive the money was concerned. The plaintiff's property, lots 3 and 4, had been sold pursuant to the judgment, in connection with lot 5. The plaintiff was entitled to redeem the whole property by paying to the city the money necessary therefor. It was necessary for him to do this if he would save his own property. If he chose to do it, the city was equally bound to receive the money, whatever the fact might be concerning which a mistake is alleged. Nor was the supposed obligation of the plaintiff in any way affected by the alleged mistake. He was at liberty to pay or not, as he should deem to be most for his interest. Plainly, the fact in question was in no way material, except as it might influence the plaintiff in determining for himself whether or not he would make redemption. It was not in any proper sense a mutual mistake of an essential fact. As he voluntarily paid the money, and thereby effectually redeemed his land, and as the city ought to have received it, irrespective of what may be the truth as to the fact

in question, it is under no legal or moral duty to repay it merely because his election to pay was influenced by an erroneous conception as to a fact which concerned him only, and not the other party.

Another reason would stand in the way of a recovery. The refusal of the city treasurer to comply with the demand of repayment was placed on the ground that the money had been paid to the purchasers under the judgment sale, who were legally entitled to receive it. The complaint, alleging this fact, does not rebut the inference, naturally to be drawn against the pleader, by alleging that in fact it had not been so paid. But we have preferred to place our decision on the broader ground above stated. The demurrer of the city was properly sustained.

We are not certain that we quite understand the position of the appellant as respects the other defendant, the administrator of the estate to which lot 5 belonged. Both in his original and reply brief it is clearly intimated that this defendant was joined as a party with the city only upon the theory that it might be considered by the court that this was necessary, even as respects the cause of action alleged against the city. If the case were so treated, the fact that there is no right of action against the city would also control the decision upon the demurrer of the other defendant. But the appellant seems to go further in his brief, and to claim a right of recovery against this other defendant; and this relief is prayed in the complaint. There may be a right of recovery, but the rules of pleading forbid such a joinder of different causes of action against separate defendants,—Gen. St. 1878, c. 66, § 118; Trowbridge v. Forepaugh, 14 Minn. 133 (Gil. 100),—and for this reason the demurrer should be sustained. The grounds upon which a recovery is sought against the different defendants are essentially different.

The causes of action are quite distinct. There is no joint liability, and, if we assume that there is a several liability on the part of the different defendants, the liability of each is distinct from that of the other, and rests upon different facts as well as different principles.

Both the orders appealed from are affirmed.

BUFFALO v. O'MALLEY.

(Supreme Court of Wisconsin, 1884. 61 Wis. 255, 20 N. W 913, 50 Am. Rep. 137.)

Appeal from the Circuit Court for Bayfield County.

Action to recover the sum of $40 which was claimed to have been overpaid by the plaintiff to the defendant upon a contract for the transportation of tan-bark. The complaint alleged that such overpayment was made under a mistake of fact as to the quantity of the bark, arising from ignorance on the part of the plaintiff as to the manner of piling and measuring tan-bark for shipment. The answer was a general denial.

The evidence given at the trial will sufficiently appear from the opinion. A motion for a nonsuit, made at the close of the plaintiff's testimony, was denied. There was a verdict and judgment for the plaintiff, and the defendant appealed.

COLE, C. J.[17] In whatever light this case is considered, we think the motion for a nonsuit should have been granted. There is no proof of fraud in the transaction, and as little of any mistake of fact for which the plaintiff is entitled to relief. The defendant was to be paid at the rate of two dollars per cord for carrying the bark in question from the place of shipment to Duluth. There is no dispute but that this was the agreement. Now the contention of plaintiff is that under a mistake as to the quantity he paid the defendant for transporting 60 cords, when there was only 40 cords according to the Duluth measurement. But there is not a scintilla of proof that the quantity of bark was to be ascertained or determined according to the manner of piling and measuring tan-bark at Duluth. It does not appear that either party so understood the contract as to the carriage. The plaintiff admitted that he measured the bark himself, when it was piled on the bank, and that there were 63 cords. When he paid for it he thought it would probably not fall short more than 3 cords. He supposed a cord of bark was a pile 8 feet long, 4 feet high, and 4 feet wide, as it is. So, on the bank where the bark was piled, it actually measured 63 cords, to the knowledge of the plaintiff. But the plaintiff seems to have been ignorant of the fact that where bark was curled badly, as his bark was, it was customary to make allowance for it in the measurement when sold; or to pile the bark tight by tramping it down and filling up the holes. And this was what caused the shrinkage in the bark when it was piled at Duluth for sale.

But, as we have said, there is not a particle of evidence that the defendant agreed to transport the bark for two dollars per cord according to Duluth measurement. No such contract was made. Upon what ground, then, can the plaintiff claim the right to recover back part of the money which he paid the defendant for transportation? There was 60 cords or more according to the bank measurement, and the plaintiff admits that he was to pay at the rate of two dollars per cord for carrying it to Duluth. Suppose a part of the bark had been rejected by buyers in Duluth because not merchantable, could it be claimed the defendant must lose his transportation of the unsalable bark? There would be quite as much reason in claiming that the defendant should stand the loss in the case supposed, as there is in saying, upon the testimony in the record, he should be paid for only 40 cords because there is a shrinkage of 20 cords when it was piled as required in the Duluth market. In truth, the evidence shows that there was no mistake as to the bank measurement, and we must assume, in the absence of all proof to the contrary, that the parties contracted with

[17] A portion of the opinion is omitted.

reference to that measurement. It follows from this that there was no overpayment.

Now, to entitle the plaintiff to recover, he was bound to prove, either that there was a mistake in the bank measurement, that there was not 60 cords as there piled, or that the defendant agreed to carry the bark for two dollars per cord according to the Duluth measurement. Neither case was established by the evidence. It is needless to observe, courts do not relieve against every mistake a party may make in his business transactions. A mistake in a matter of fact, to be the ground of relief, must be of a material nature, inducing or influencing the agreement, or in some matter to which the contract is to be applied. It is obvious the mistake which the plaintiff made was in supposing that curled bark, piled in the loose manner his bark was piled, would hold out in measure when piled as dealers required. But this was a mistake as to a collateral fact, which had nothing to do with the contract of carriage. It is said the plaintiff paid for the carriage upon the belief that there was 60 cords of it, and that this belief was founded upon his having measured the bark on the bank. He certainly was not mistaken as to the quantity of the bark on the bank, but was mistaken in supposing that a dealer would take it at Duluth piled in the manner he had piled it. * * *

It follows from these views that the nonsuit should have been granted. Judgment of the circuit court is reversed, and a new trial ordered.[18]

[18] "It is clear, from these and other illustrations which might be given, that a court of equity will not give relief in all cases of mistake. There are many extrinsic facts surrounding every business transaction which have an important bearing and influence upon its results. Some of them are generally unknown to one or both of the parties, and if known might have prevented the transaction. In such cases, if a court of equity could intervene and grant relief, because a party was mistaken as to such a fact which would have prevented him from entering into the transaction if he had known the truth, there would be such an uncertainty and instability in contracts as to lead to much embarrassment. As to all such facts, a party must rely upon his own circumspection, examination and inquiry; and if not imposed upon or defrauded, he must be held to such contracts." Per Earl, J., in Dambmann v. Schulting (1878) 75 N. Y. 55.

An extreme instance of the doctrine announced by the principal case is found in Cleveland-Cliffs Iron Co. v. East Itasca Mining Co. (1906) 146 Fed. 232, 76 C. C. A. 598 (facts stated in note, page 168, infra).

II. Defenses

(A) Retention of Benefit by Defendant Not Unconscionable

MUNT v. STOKES.

(Court of King's Bench, 1792. 4 Term R. 561.)

This was an action to recover £2004. 3s. 4d. for money had and received by the defendants for the use of the plaintiffs as executors of A. McIntosh: the defendants pleaded the general issue; and at the trial a special case was reserved, stating the following facts:

In January, 1785, the plaintiff's testator Alexander McIntosh was at Calcutta in Bengal, in the East Indies, with the ship "Hussar," carrying Danish colours, whereof he was at that time master and owner. By the laws of Denmark, all persons who are masters of ships belonging to Danish ports, and carrying the Danish flag, must be either natural-born subjects of the kingdom of Denmark, or become denizens of Denmark, and take the oaths of allegiance to the King of Denmark. On the 6th of January, 1785, McIntosh borrowed at Calcutta of the defendants (being British subjects) 20,000 current rupees upon the terms mentioned in the condition of a respondentia bond (which was stated). A. McIntosh soon afterwards sailed in the ship the "Hussar," with Danish colours, from Calcutta to the coast of Coromandel, and there took goods on board, and from thence sailed for Copenhagen. In December, 1785, A. McIntosh, died, having first made his will, and appointed the plaintiffs and four others executors. The plaintiffs alone proved the will in the Prerogative Court of Canterbury. On 12th October, 1786, the plaintiffs, upon application to them by the defendants, paid to the defendants £2004. 3s. 4d. in discharge of the bond so entered into by McIntosh.[19]

Romilly, for the plaintiffs, made three points: 1st, the defendants could not have recovered this money on the bond, either from the plaintiffs or their testator, the transaction being void by stat. 7 Geo. I, c. 21, § 2; and 21 Geo. III, c. 65, § 29[20] (which was admitted). 2dly, the plaintiffs, having paid it, are entitled to recover it back. In all cases, except two, where a party has paid money under a mistake, either of fact or of law, he may recover it back again in an action for money had and received. Farmer v. Arundell, 2 Bl. Rep. 824. The two excepted cases are, 1st, where he was bound in conscience, though not in law, to make the payment; 2dly, where he is particeps criminis; but this case does not fall within either of those exceptions. * * *

[19] The statement of facts is abridged.

[20] These statutes made void all contracts for loans by British subjects secured by bonds on foreign ships engaged in the East India trade.

Lord Kenyon, C. J. (stopping Law, contra). It has been said that this was not a debt which the plaintiffs were bound in conscience to pay to the defendants; but I think that they were bound both in honour and conscience to refund the money which the defendants had advanced, though the original contract were contrary to a positive law; for this is not a penalty, but money which the defendants had actually advanced; and the original contract was not malum in se, but malum prohibitum. Though the security on which this money was borrowed was void by the statute, I do not know but that an action for money had and received might have been maintained by the defendants to recover back this money: the cases cited relative to premiums go a great way to shew that; but the ground on which I go is this, that there was no misrepresentation or any improper conduct by the defendants to extort the money from the plaintiffs; but the plaintiffs, knowing the whole transaction, and the law also, as they were bound to know, voluntarily paid it. There was nothing contrary to conscience in the defendants receiving the money which they had advanced; the plaintiffs therefore are not intitled either in law or in equity to recover it back again.[21] This is not like a case which I remember many years ago, where an action was brought to recover the excess of a copyhold fine: there it was held, that the money might be recovered back in an action for money had and received against the steward, because he had used coercion to obtain payment of the excessive fine; he would not deliver the title-deeds without. Nor is this a case of singular hardship against the executors; for where executors pay a debt of an inferior nature, though conscientiously and without any view to prefer one creditor to another, the loss must be borne by them individually, if the assets be insufficient to pay all the debts of a higher nature. Without going into the question of form, upon which I should be sorry to have the case decided, I am clearly of opinion that on the merits the plaintiffs are not intitled to recover.

Buller, J. In the case of illegal contracts, one party cannot recover against the other on the contract itself: but if he come to rescind the contract, he may recover back so much money as has been paid. This was established in Jaques v. Golightly, and in Lowry v. Bourdieu, Dougl. 468 (3d Edit.). If the party come into a Court of Justice to enforce an illegal contract, two answers may be given to his

[21] "This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial and therefore much encouraged. It lies only for money which, ex æquo et bono, the defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law; as in payment of a debt barred by the Statute of Limitations, or contracted during his infancy, or to the extent of principal and legal interest upon an usurious contract, or for money fairly lost at play; because in all these cases, the defendant may retain it with a safe conscience, although by positive law he is barred from recovering." Per Lord Mansfield, C. J., in Moses v. Macferlan (1760) 2 Burr. 1005, 1012.

See also Farmer v. Arundel (1772) 2 Wm. Bl. 824, note, page 203, infra.

demand: the one, that he must draw justice from a pure fountain; and the other, that potior est conditio possidentis. Such would have been this case if the plaintiffs had not paid the money, and an action had been brought on the contract: but, the plaintiffs having paid it, the question is, whether the defendants retain the money against conscience? I think they do not, because they have only received back the money which they had before advanced to the plaintiff's testator. I also think that the point of form is against the plaintiffs: they should have declared in their own right, and not as executors. At all events, if the action be brought by the executors, all of them should have joined; and this is a defect in the plaintiffs' title. Where indeed several are named executors, and one only proves the will and acts, that one is liable to an action; but he cannot sue alone, until the others have renounced.

Postea to the defendants.[22]

BUEL v. BOUGHTON.

(Supreme Court of New York, 1846. 2 Denio, 91.)

Error to the Onondaga C. P. Buel sued Boughton for money had and received to his use; and the case was substantially as follows: One Charlotte Smith held a bond against the plaintiff for $2,650, payable in six equal annual instalments, with annual interest from April 1, 1843. James H. Fuller, in right of his wife, owned and had an interest in the bond to the amount of $498.10. On the 1st day of April, 1843, the plaintiff gave James H. Fuller his negotiable promissory note for said sum of $498.10, having more than two years to run. The plaintiff agreed to make the note payable with interest; but interest was left out of the note by mistake in drawing it. On the day of the date of the note Charlotte Smith indorsed and receipted the

[22] In Jackson v. City of Atlanta (1878) 61 Ga. 228, the plaintiff paid taxes to the city of Atlanta, relying on a survey which determined that plaintiff's land was within the city limits. A subsequent survey disclosed the fact that plaintiff's land was outside of the city limits. Plaintiff sued to recover the taxes so paid. The court denied relief, saying: "The plaintiff paid his tax to the city without objection or protest that his property was not subject to taxation by the city, and that tax having been paid into the city treasury, and expended for the common benefit and protection of those who were recognized as being within the limits of the city, including the plaintiff, he is not now entitled to recover it back from the city."

In Pensacola & Atlanta Railroad Co. v. Braxton (1894) 34 Fla. 471, 16 South. 317, A. presented to the railroad company a claim for damages for an ox killed by a train of the railroad company, and about the same time B. presented a similar claim for killing an ox. The railroad, intending to pay B.'s claim, gave a voucher for the money to A., who bore the same name as B. Held, that A., having received and cashed this voucher in good faith, believing that it was given him in payment of his claim, was under no obligation to refund the same, the court saying: "Under these circumstances we do not think that the retention of the money by him necessarily involved any smartings of good conscience."

See also Dickey County v. Hicks (1905) 14 N. D. 73, 103 N. W. 423.

amount of the note on the bond. On the day the note was given, James H. Fuller transferred it to Almerin Fuller, who indorsed the amount of the note on a bond which he held against James, which bond was on interest. This was done on the supposition that the note was also on interest. About twenty days afterwards Almerin Fuller transferred the note to the defendant, who indorsed the amount of the note, and of the interest which was supposed to have then accrued upon it, on a bond which he held against Almerin Fuller, which bond was on interest. On the 23d of May, 1845, the plaintiff paid the note to the defendant, and by mistake, supposing the note to have been written with interest, paid the defendant $71.20 for interest on the note, and took it up. The plaintiff brought this suit to recover back the sum so paid by mistake for interest. The defendant set up the other facts which have been mentioned as an answer to the action; and the court decided in his favor. A verdict and judgment having passed for the defendant, the plaintiff now brings error on a bill of exceptions.

BRONSON, C. J. This is a remarkable case. The plaintiff first omitted, by mistake, to make the note payable with interest, as he should have done; and then, by another mistake, he corrected the first error by paying interest, when the note itself imposed no such obligation. And thus by two blunders the parties have come out right at last. Or at least, the plaintiff has paid no more than he ought to pay; and there would be no ground for an action to recover back the money paid for interest, if the payment had been made to James H. Fuller, the payee of the note, against whom the first mistake was made. One party would in that case have paid, and the other received just what in justice and honesty ought to be paid and received.

But the payment was not made to James H. Fuller; and this leads me to notice that not only the plaintiff and James H. Fuller acted from beginning to end under the mistaken supposition that the note was made payable, as it should have been, with interest; but the note was twice transferred, and both Almerin Fuller and the defendant took it under the same mistake of supposing it carried interest. Now as against the plaintiff, James H. Fuller had an equitable claim to have the mistake corrected, so as to give him interest on the debt. Then Almerin, having taken and paid James for the note as though it were on interest, had an equitable claim to have the mistake corrected, so as to give the interest to him. The same thing is true as between the defendant and Almerin. The defendant took and paid him for the note as though it carried interest. And thus by a series of mistakes the equitable claim to interest which was originally in James, passed from him to Almerin, and from Almerin to the defendant; so that, at the time the money was paid, the defendant was the person who was equitably entitled to receive it. He could not have sued the plaintiff for it at law in his own name; but in a court of equity the money would have been awarded to him, and not to James H. Fuller. It has

come into the defendant's hands without suit, and from the person who ought to pay it; and I see no sufficient reason for requiring it to be refunded. Whether the defendant could sue at law in his own name to recover the money; or whether, having fairly got it, this action for money had and received to the plaintiff's use can be maintained, are very different questions.

This is an equitable action, which may be defended upon the same equitable principles as those upon which it is maintained. As a general rule, the question is, to which party ex æquo et bono does the money belong? And in this case, I think it belongs to the defendant, who has got it. Let us suppose that the plaintiff had refused to pay the interest to the defendant; but, being liable to pay it to some one, he had paid it, either voluntarily or by compulsion, to James H. Fuller, between whom and the plaintiff the original mistake was made. James might then have been compelled to pay the money to Almerin; and Almerin to the defendant. Or if we begin at the other end, the defendant might have fallen back upon Almerin, and compelled him to correct the mistake by paying the interest; Almerin could have gone back in like manner upon James; and James upon the plaintiff. And so in any way of viewing the matter, the plaintiff was bound in equity and good conscience to pay the money; and the defendant was the man who in equity and good conscience was entitled to receive it. He has got it; and to allow the plaintiff to recover it back, would be to make this the first in a circuit of four actions which would end in leaving the money just where it was at the beginning.

It is said that although the plaintiff has paid the interest to the defendant, he may be compelled to pay it again in an action on his bond to Mrs. Smith. But I think not. It fully appears that the principal sum of money for which the note was given belonged to James H. Fuller; and of course he was entitled to the interest which should afterwards accrue on that sum. If the indorsement made on the plaintiff's bond would not of itself preclude Mrs. Smith from recovering the interest in question, it would clearly be enough to show in addition that the plaintiff had corrected the error by paying the interest. But if the plaintiff should succeed in recalling the money, then undoubtedly Mrs. Smith, on proving the mistake in giving the note, and that the plaintiff had not corrected it, might recover this interest for the benefit of James H. Fuller. But by leaving the money where it is, the whole series of mistakes will be corrected, and all parties, unless it be the plaintiff, will be satisfied.

Judgment affirmed.[23]

[23] In Jackson v. McKnight (1879) 17 Hun, 2, the plaintiff by mistake made an overpayment of interest on a mortgage, the principal amount thereof being at that time overdue. The plaintiff sued to collect the amount of such overpayment. The court, in reversing a judgment for the plaintiff and ordering a new trial, said: "The action to recover money paid by mistake is sustained, because otherwise the party would suffer an unjust loss. It should not be

WOODRUFF v. CLAFLIN CO.

(Court of Appeals of New York, 1910. 198 N. Y. 470, 91 N. E. 1103, 28 L. R. A. [N. S.] 440, 19 Ann. Cas. 791.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

WILLARD BARTLETT, J.[24] Jason G. Cooke, who died at Potsdam, N. Y., on December 23, 1899, was indebted to the defendant in the sum of $725.95. His widow, the plaintiff, became his administratrix on January 2, 1900. The defendant pressed for payment of its claim, threatening to sue if it were not speedily paid, whereupon the administratrix, believing the estate to be solvent, compromised it by paying $700 in the month of May, 1900. Upon her subsequent accounting in the Surrogate's Court it turned out that the estate had been from the outset insolvent and was really capable of paying only a dividend of 71.04 per cent. upon its indebtedness. Such a dividend would have given the H. B. Claflin Company $178.48 less than it received from the administratrix in discharge of its claim, and she brought the present suit to recover that amount with interest. As evidence of the insolvency of the estate and its extent, she was allowed to introduce, over the defendant's objection and exception, a decree of the Surrogate's Court of St. Lawrence county upon her accounting, to which it is conceded the defendant was not a party, and a second decree of the same court purporting to amend the first, made in a proceeding which the defendant was cited to attend. The competency of this proof will be considered presently. The trial court directed a verdict for the plaintiff, and the judgment thereon has been affirmed by the Appellate Division.

We have no statute in New York giving the personal representative of an insolvent decedent a right of action in such a case as this; and the first question presented for our determination is whether an action of this character can be maintained in the absence of statutory authority therefor. The only New York case referring to the question, to which our attention has been called by counsel, is Gulke v. Uhlig, 55 How. Prac. 434, which was decided by a General Term of the New York Court of Common Pleas, consisting of Chief Justice Charles P. Daly and Judges Van Hoesen and Joseph F. Daly. Two opinions were written, one by Judge Van Hoesen and the other by Judge Joseph F. Daly. It does not appear with which of these the Chief Justice concurred. Judge Van Hoesen distinctly assumed that an administrator could recover money which he had overpaid to creditors in confidence in the

extended to cases where the relief is not necessary. It is not necessary in the present case, because the plaintiff can protect himself whenever he is sued on the bond and mortgage."

[24] Portions of the opinion are omitted.

ultimate solvency of the estate, but insisted that the suit must be brought in equity and not at law; while Judge Joseph F. Daly avowed his inability to perceive any good reason for denying the administratrix relief in an action at law, if she made out a case which would entitle her to recover formerly in equity. The case involved other issues, however, and it is impossible to ascertain from the report which of these conflicting views received the sanction of a majority of the court.

The decisions in other states are conflicting. The doctrine which is supported by the weight of judicial authority, and which, it seems to me, we ought to sanction, may be briefly stated. In the case of the death of an insolvent debtor, the law contemplates equality in the distribution of the proceeds of his estate among his creditors. A creditor who seeks more than his pro rata share of the debtor's property under such circumstances seeks that which does not belong to him, and makes the other creditors poor in proportion. To insist upon full payment from an insolvent estate is dishonest, if the party thus insisting is aware of the insolvency. Hence, whether the overpaid creditor shares the erroneous belief of the administrator that the estate is solvent, or is acquainted with its true condition, he is equally obligated to return the surplus he has received over the dividend to which he was entitled when it has become judicially ascertained that the estate is not large enough to pay all the debts in full; for in the first case both parties act under a mutual mistake of fact, and in the second case there is a wrongful intent on one side and a mistake on the other. The creditor who has received the excess has no right to retain it in equity and good conscience; and the personal representative who has innocently paid such excess may maintain an action to recover it, if he moves seasonably after the ascertainment of the insolvency, and has done nothing which ought to constitute an estoppel in favor of the overpaid creditor.[25] * * *

Without continuing the discussion of the authorities any further, I am of the opinion, as already intimated, that the plaintiff has a right of action upon the facts set out in her complaint. It does not follow, however, that she has established her alleged cause of action by competent proof. It was essential for her to show that the estate was insolvent and the extent of its insolvency. The adjudication to the effect that it could pay creditors only 74.01 per cent. by the Surrogate's Court of St. Lawrence county in the first decree which she put in evidence was not binding upon the defendant corporation, since it was not made a party to the proceeding in which that decree was entered. * * * There was no other sufficient proof of those facts, and the error in receiving this decree, therefore, requires a reversal of the judgment.

The administatrix carried on the intestate's business for some time at a loss, and the circumstances under which she did this are relied upon by the appellant as insuperable obstacles to a recovery in her be-

[25] The court here discussed the authorities.

half, as well as the point that a voluntary payment is not recoverable. The defense of voluntary payment is not available where the payment was the result of mistake; and it does not appear that the conduct of the business by the administratrix, after her settlement with the defendant, in any manner affected their respective rights or relations.

The conclusion which I have reached is that, while an action of this character is maintainable, some of the most material evidence offered and received in behalf of the plaintiff was inadmissible. The defendant is, therefore, entitled to a reversal of the judgment and a new trial, costs to abide event.

Judgment reversed, etc.[26]

(B) Negligence

KELLY v. SOLARI.

(Court of Exchequer, 1841. 9 Mees. & W. 53.)

Assumpsit for money paid, money had and received, and on account stated. Plea, non assumpsit. At the trial before Lord Abinger, C. B., at the London sittings after Trinity term, it appeared that this was an action brought by the plaintiff, as one of the directors of the Argus Life Assurance Company, to recover from the defendant, Madame Solari, the sum of £197. 10s. alleged to have been paid to her by the company under a mistake of fact, under the following circumstances.

Mr. Angelo Solari, the late husband of the defendant, in the year 1836, effected a policy on his life with the Argus Assurance Company for £200. He died on the 18th of October, 1840, leaving the defendant his executrix, not having (by mistake) paid the quarterly premium on the policy, which became due on the 3d of September preceding. In November, the actuary of the office informed two of the directors, Mr. Bates and Mr. Clift, that the policy had lapsed by reason of the nonpayment of the premium, and Mr. Clift thereupon wrote on the policy, in pencil, the word "lapsed." On the 6th of February, 1841, the defendant proved her husband's will; and on the 13th, applied at the Argus office for the payment of the sum of £1000., secured upon the

[26] Contra: Carson v. McFarland (1828) 2 Rawle (Pa.) 118, 19 Am. Dec. 627, in which case the court said: "In this case the administrator paid money justly due and paid it within the year allowed by law to ascertain the situation of the estate. The assets were, or ought to have been, better known to the administrator than anybody else. No accidental failure of the fund occurred to any material extent; the defendant has no money to which in honesty and conscience he is not entitled, as against the estate of this deceased. The hardship on the plaintiff may be great. The hardship on the defendant, if called on to refund, would not be small; and the confusion, inconvenience and general uncertainty which would follow from a decision that an honest creditor who had gotten an honest debt was liable to be sued and compelled to repay would be so great—would make the settlement of an estate so uncertain and so interminable, that we think the plaintiff ought not to recover."

The authorities are collected in 19 Ann. Cas. 794.

policy in question and two others. Messrs. Bates and Clift, and a third director, accordingly drew a cheque for £987. 10s., which they handed to the defendant's agent, the discount being deducted in consideration of the payment being made three months earlier than by the rules of the office it was payable. Messrs. Bates and Clift stated in evidence, that they had, at the time of so paying the money, entirely forgotten that the policy in question had lapsed. Under these circumstances, the Lord Chief Baron expressed his opinion, that if the directors had had knowledge, or the means of knowledge, of the policy having lapsed the plaintiff could not recover, and that their afterwards forgetting it would make no difference; and he accordingly directed a nonsuit, reserving leave to the plaintiff to move to enter a verdict for him for the amount claimed.

Thesiger obtained a rule nisi.

Lord Abinger, C. B. I think the defendant ought to have had the opportunity of taking the opinion of the jury on the question whether in reality the directors had a knowledge of the facts, and therefore that there should be a new trial, and not a verdict for the plaintiff; although I am now prepared to say that I laid down the rule too broadly at the trial, as to the effect of their having had means of knowledge. That is a very vague expression, and it is difficult to say with precision what it amounts to; for example, it may be that the party may have the means of knowledge on a particular subject, only by sending to and obtaining information from a correspondent abroad. In the case of Bilbie v. Lumley, the argument as to the party having means of knowledge was used by counsel, and adopted by some of the judges; but that was a peculiar case, and there can be no question that if the point had been left to the jury, they would have found that the plaintiff had actual knowledge. The safest rule, however is, that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may also be cases in which, although he might by investigation learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding; in that case there can be no doubt that he is equally bound. Then there is a third case, and the most difficult one,—where the party had once a full knowledge of the facts, but has since forgotten them. I certainly laid down the rule too widely to the jury, when I told them that if the directors once knew the facts they must be taken still to know them, and could not recover by saying that they had since forgotten them. I think the knowledge of the facts which disentitles the party from recovering, must mean a knowledge existing in the mind at the time of payment. I have little doubt in this case that the directors had forgotten the fact, otherwise I do not believe they would have brought the action; but as Mr. Platt certainly has a right to have that question submitted to the jury, there must be a new trial.

PARKE, B. I entirely agree in the opinion just pronounced by my Lord Chief Baron, that there ought to be a new trial. I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back, and it is against conscience to retain it; though a demand may be necessary in those cases in which the party receiving may have been ignorant of the mistake. The position that a person so paying is precluded from recovering by laches, in not availing himself of the means of knowledge in his power, seems, from the cases cited, to have been founded on the dictum of Mr. Justice Bayley, in the case of Milnes v. Duncan [9 B. & C. 671]; and with all respect to that authority, I do not think it can be sustained in point of law. If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it.

GURNEY, B., concurred.

ROLFE, B. I am of the same opinion. With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it. But I agree that Mr. Platt has a right to go to the jury again, upon two grounds: first, that the jury may possibly find that the directors had not in truth forgotten the fact; and secondly, they may also come to the conclusion, that they had determined that they would not expose the office to unpopularity, and would therefore pay the money at all events: in which case I quite agree that they could not recover it back.

Rule absolute for a new trial.[27]

[27] "In my judgment when the plaintiff is seeking relief, not on a contract, but on the footing of a mistake of fact, the mistake is not the less a ground for relief because he had the means of knowledge." Per Fry, J., in Willmott v. Barber (1880) 15 Ch. D. 96, 106.

APPLETON BANK v. McGILVRAY.

(Supreme Judicial Court of Massachusetts, 1855. 4 Gray, 518, 64 Am. Dec. 92.)

Action of contract to recover $370.42, received by the defendants to the plaintiffs' use.

At the trial before Bigelow, J., the plaintiffs, to prove their case, called a witness, who testified that he had been an expressman between Boston and Lowell for eleven years, and that was his whole business; that sometime previous to April 7, 1854, he received for collection from the defendants, a partnership doing business in Boston, two notes of J. C. Hildreth & Co., a partnership doing business in Lowell, for $370.42 each, the one due on the 7th and the other on the 13th of April, and both payable to the defendants, and indorsed in blank by them; and was directed to collect them in the ordinary way, without any directions as to protesting them, and gave his receipt therefor; that it was sometimes his custom to collect notes by depositing them in a bank, and sometimes by calling on the parties personally, though he did not communicate to the defendants how he was going to collect their notes, and did not know that they knew he ever collected notes delivered him through the banks; that before the 7th of April he deposited the notes with the plaintiffs, a bank in Lowell, for collection; that on the 8th of April he called on the plaintiffs, and asked if the note due the day before had been paid, and was informed by a clerk of the plaintiffs that it had been, and received the amount of it from the plaintiffs; that the plaintiffs received no compensation for collecting these notes, and he did not communicate to the plaintiffs, when he left the notes, to whom they belonged; that he took the money so paid, and the same day paid it to the defendants, but did not remember telling the defendants, when he paid them the money, that he collected it through the plaintiffs or any bank; and the defendants paid him for his services.

The plaintiffs also proved that, by reason of the notes not having been placed on their regular file, they had not notified Hildreth & Co., the promisors, of the maturity of the first note, and their clerk was led into the mistake of supposing that it had been paid, when in fact it had not, and has never been paid to any one; that on the 10th of April, as soon as the mistake was discovered, the plaintiffs demanded payment of the promisors, who refused, and on the 11th of April these facts were communicated to the defendants, and the note tendered them, and the money they had received from the carrier demanded by the plaintiffs, and refused by them.

It was also proved that the promisors had not funds to pay the note when due on the 7th of April, and had determined not to pay it, and would not have paid it, if presented; that after the 7th they paid no business debts, (this being one,) and no change took place in their circumstances; but they continued in possession of a stock of dry goods until the 17th of April, when they were sued by the defendants

on the note which fell due on the 13th of April, and an attachment of their stock made, which was afterwards dissolved by an assignment of their estate under the insolvent laws; and the second note was never paid, but was proved in insolvency against their estate.

Upon these facts, the defendants contended that there was no such privity or agency proved to have existed between the parties, as to enable the plaintiffs to maintain this action; and that, as the mistake arose from the negligence of the plaintiffs, they had no remedy against the defendants. A verdict was taken by consent for the plaintiffs, subject to the opinion of the full court.

BIGELOW, J.[28] The objection that this action cannot be maintained, for want of privity between the parties to the suit, is not sustained by the proof. * * *

The privity necessary to make the parties liable to each other is created by the authority to employ a sub-agent, which is fairly to be inferred from the evidence.

This view of the legal relation of the parties is decisive of the remaining objection to the plaintiffs' right of recovery in this action. The money was clearly paid over to the defendants under a mistake of fact, and, upon familiar principles, an action can be maintained to recover it back. It is no answer to the plaintiffs' claim, that the mistake arose from the negligence of the plaintiffs. The ground on which the rule rests is, that money, paid through misapprehension of facts, in equity and good conscience belongs to the party who paid it; and cannot be justly retained by the party receiving it, consistently with a true application of the real facts to the legal rights of the parties. 2 Saund. Pl. & Ev. (2d Ed.) 394. The cause of the mistake therefore is wholly immaterial. The money is none the less due to the plaintiffs, because their negligence caused the mistake under which the payment was made. The case would have been different, if it had appeared that the defendants had suffered any damage, or changed their situation as respects their debtor, by reason of the laches of the plaintiffs. But the facts show that their rights were wholly unaffected by the mistake under which the payment was made. Nothing occurred subsequently to the payment, which renders it unconscientious to recover the money back. It is therefore clear that the defendants have money belonging to the plaintiffs in their hands, to which they show no legal or equitable title. Kelly v. Solari, 9 M. & W. 54; Bell v. Gardiner, 4 Man. & Gr. 11; 2 Smith's Lead Cas. 243, 244.

Judgment on the verdict.[29]

[28] A portion of the opinion is omitted.

[29] "It is the fact that one by mistake unintentionally pays money to another to which the latter is not entitled from the former, which gives the right of action, and the fact that the mistake occurs through negligence does not give the payee any better or the payer any worse title to the money." Per Earl, C., in Lawrence v. American National Bank (1873) 54 N. Y. 433, 436.

ASH v. McLELLAN.

(Supreme Court of Maine, 1905. 101 Me. 17, 62 Atl. 598.)

On exceptions by plaintiff.

Money had and received to recover back money paid by the plaintiffs to the defendant.

STROUT, J.[30] Carter recovered a judgment against George R. Robinson. This judgment was duly assigned to the defendant McLellan, who became its legal owner. McLellan sued the judgment, and recovered a new judgment in Carter's name for $145.82 debt and $9.93 costs at the April term, Supreme Judicial Court, 1896. Upon an execution upon this judgment, dated August 30, 1902, McLellan caused the debtor Robinson to be arrested, and the debtor gave bond to take the poor debtor's oath as provided by statute. The plaintiffs were sureties on that bond. Upon notice to Carter, Robinson did in fact take the poor debtor's oath on January 24, 1903, and thus performed the condition of his bond, but McLellan had no knowledge of this fact from any source. After expiration of the time limited in Robinson's bond, McLellan, believing the condition had not been performed and that the sureties were liable, called upon them for payment. Robinson at that time was in the employment of the plaintiffs, and they saw him daily, and were indebted to him to some amount, which at the end of the season amounted to something over $200.

Upon the call for payment by McLellan of the plaintiffs, Mr. Ash, one of the sureties, and one of the plaintiffs, wrote him asking for his best terms, to which McLellan replied that he "would send the execution and bond fully discharged for $190, the sureties paying the deputy sheriff." This was less than the amount due. Thereupon plaintiffs sent McLellan check for $190, and received back the bond and execution against Robinson fully discharged.

September 29, 1903, the plaintiffs demanded of McLellan the return of the money paid him, but made no offer to return the bond and execution at any time until after the hearing of this suit to recover the money. They obtained what they paid for, not only their discharge from the bond but the discharge of the judgment against Robinson. If for any cause they had the right to rescind or recover back the money paid, it was indispensable that they should have returned or offered to return the bond and execution before suit brought. But instead of that they retained the discharged execution and sued to recover the money paid therefor. Failing to do this, this action cannot be maintained.

But, waiving this technical defense, and treating the case as one of a voluntary payment upon an honest claim of right by McLellan, though in fact unfounded, it would be expected that when the plaintiffs were

[30] The statement of facts is omitted.

asked to respond for the default of Robinson, the principal in a bond on which they were sureties, they would have called his attention to it, and asked him to make payment, or at least for authority to apply to that purpose the amount in their hands due to him, but instead of this the case finds that "neither Mr. Ash nor Mr. Marcyes made any inquiry of Mr. Robinson about the matter, and sent the check without consulting him and without his knowledge, fearing he would leave if told of the matter, and they desired to have his wages accumulate to that amount." The payment was in no sense compulsory. Plaintiffs knew all the facts that McLellan knew, and had excellent opportunity to learn that Robinson had taken the oath provided for in the condition of his bond. They intentionally refrained from consulting him, though he was in their employ and they saw him daily, for the purpose "to have his wages accumulate" to the amount. Both parties believed there was a legal liability of plaintiffs.

The true principle applicable in such cases is stated by Walton, J., in Parker v. Lancaster, 84 Me. 515, 24 Atl. 952, to be that "when one demands money under a claim of right, and uses no other means to obtain it than importunity and persistency, or a threat, expressed or implied, of resort to litigation to obtain it, if it is not voluntarily paid, and the one of whom the money is demanded has time for consideration and deliberation, and to obtain the advice of counsel or friends, and the money is then voluntarily paid to settle the demand, it cannot be recovered back, though the demand is illegal and unjust." Early in May, 1903, McLellan wrote the deputy sheriff in regard to forfeiture of the bond, and to notify the sureties. This letter was read to plaintiffs, who then wrote the defendant for his terms. McLellan replied June 16th, and the check was not sent till June 20th. The plaintiffs therefore had ample time for consideration.

The rule of law quoted from Parker v. Lancaster is supported by Norris v. Blethen, 19 Me. 351, and Gooding v. Morgan, 37 Me. 419. In the latter case, Chief Justice Shepley says: "The law is regarded as settled in this state, if one with a full knowledge of the facts or with the means of knowledge, voluntarily pays money under a claim of right, that he cannot recover it back." To the same effect is Norton v. Marden, 15 Me. 45, 32 Am. Dec. 132. See, also, Gilpatrick v. Sayward, 5 Greenl. (5 Me.) 465; Rawson v. Porter, 9 Greenl. (9 Me.) 119; Wilson v. Barker, 50 Me. 447.

The plaintiffs had at hand the means to learn all the facts by an inquiry of their servant daily seen by them. It was inexcusable, almost culpable negligence not to consult him before making the payment. They intentionally refrained from doing this from an ulterior motive insufficient to justify their nonaction. In such case they should be charged with knowledge of what they might easily and ought to have learned, and ought not to be permitted to take advantage of their self-imposed ignorance. This doctrine is sustained by East Had-

dam Bank v. Scovil, 12 Conn. 310; Behring v. Somerville, 63 N. J. Law, 568, 44 Atl. 641, 49 L. R. A. 578; Stevens v. Head, 9 Vt. 174, 31 Am. Dec. 617; West v. Houston, 4 Har. (Del.) 170; Simmons v. Looney, 41 W. Va. 738, 24 S. E. 677; Harner v. Price, 17 W. Va. 545, as well as by the cases in this state, supra. There are opposing decisions but we are satisfied with the rule settled in this state.

By making this payment and obtaining a discharge of the execution, without informing themselves of the fact of the disclosure of Robinson, the plaintiffs placed the defendant in a worse position than he would otherwise have been, since they thereby prevented his enforcing his execution against the judgment debtor in some of the ways that were still open to him. A suit in which the plaintiffs could have been summoned as trustees would apparently have secured all or a large part of the debt, as the plaintiffs owed Robinson at the end of that season over $200.

A majority of the court is of the opinion that the ruling below that judgment should be for the defendant is correct, and the entry must be:

Exceptions overruled.

(C) Change of Position by Defendant

BULLER v. HARRISON.

(Court of King's Bench, 1777. Cowp. 565.)

Upon shewing cause why a new trial should not be granted in this case, Lord Mansfield read his report as follows:

This was an action for money had and received, brought by the plaintiff against the defendant, to recover back a sum of £2100. paid him as due upon a policy of insurance, as agent for the insured, Messrs. Ludlow and Shaw, resident at New York. This sum the plaintiff had paid, thinking the loss was fair. Notice of the loss was given by the defendant to the plaintiff on the 20th of April. Part of the money was paid at that time, and the remainder on the 6th of May following; on which day the defendant passed the whole sum in his account with Messrs. Ludlow and Shaw, and gave credit to them for it against a sum of £3000. in which they stood indebted to him. On the 17th of May, notice was given by the plaintiff to the defendant that it was a foul loss. At this time, nothing had happened to alter the situation of the defendant, or to make it different from what it was on the 20th of April. He had accepted no fresh bills, advanced no sum of money, nor given any new credit to his principals; but affairs between them and him remained precisely in the same situation as on the 20th of April. The question at the trial was, whether this action could be maintained against the defendant, as agent of the insured; which depended on this; whether the defendant's having

placed this money to the account of his principals, in the manner before stated, was equivalent to a payment of it over.

In general the principle of law is clear; that if money be mispaid to an agent expressly for the use of his principal, and the agent has paid it over, he is not liable in an action by the person who mispaid it: because it is just, that one man should not be a loser by the mistake of another; and the person who made the mistake is not without redress, but has his remedy over against the principal. On the other hand it is just, that as the agent ought not to lose, he should not be a gainer by the mistake. And therefore, if after the payment so made to him, and before he has paid the money over to his principal, the person corrects the mistake; the agent cannot afterwards pay it over to his principal, without making himself liable to the real owner for the amount. But the present case turns upon this; that the agent was precisely in the same situation at the time the mistake was discovered, as before. At the trial I inclined to think the plaintiff ought to recover; but did not direct the jury; and they found for the defendant. I am satisfied I mistook in leaving it open to the jury: for it is clearly a question of law, not a matter of fact: and in conscience the defendant is not entitled to retain the money. Therefore I should have let it to the jury in this manner; if you are satisfied that the money was paid by mistake, and the defendant's situation not altered by any new circumstance since, but that every thing remained in the same state as it was on the 20th of April, you ought to find for the plaintiff.

Mr. Wallace and Mr. Dunning were in support of the rule; but Lord Mansfield thought the case so clear, that his Lordship stopped Mr. Dunning, as being unnecessary to give himself any trouble.

Lord Mansfield. I am very glad this motion has been made: for I desire nothing so much as that all questions of mercantile law should be fully settled and ascertained; and it is of much more consequence that they should be so, than which way the decision is. The jury were embarrassed on the question whether this was a payment over. To many purposes it would be. It is now argued, that this is not a mere placing to account, but a making rest. If it were, it would not vary the case a straw. I verily believe the jury were entangled in considering it as a payment over. There is no imputation upon a man who trusts to a misrepresentation of the insured. It is greatly to his honour; but it makes it of consequence to him to know, how far his remedy goes if he is imposed upon. The whole question at the trial was, whether the defendant, who was an agent, had paid the money over. Now, the law is clear, that if an agent pay over money which has been paid to him by mistake, he does no wrong; and the plaintiff must call on the principal; and in the case of Muilman v. ———, where it appeared that the money was paid over, the plaintiff was nonsuited. But, on the other hand shall a man, though innocent, gain

by a mistake, or be in a better situation than if the mistake had not happened? Certainly not. In this case, there was no new credit, no acceptance of new bills, no fresh goods bought or money advanced. In short, no alteration in the situation which the defendant and his principals stood in towards each other on the 20th of April. What then is the case? The defendant has trusted Ludlow & Co. and given them credit. He trafficks to the country where they live, and has agents there who know how to get the money back. The plaintiff is a stranger to them and never heard of their names. Is it conscientious then that the defendant should keep money which he has got by their misrepresentation, and should say, though there is no alteration in my account with my principal, this is a hit, I have got the money and I will keep it? If there had been any new credit given, it would have been proper to have left it to the jury to say, whether any prejudice had happened to the defendant by means of this payment: but here no prejudice at all is proved, and none is to be inferred. Under these circumstances I think (and Mr. Justice ASTON with whom I have talked the matter over is of the same opinion) that the defendant has no defence in point of law, and in point of equity and conscience he ought not to retain the money in question.

Mr. Justice WILLES and Mr. Justice ASHHURST were of the same opinion.

PER CUR. Rule for a new trial absolute.

NEWALL v. TOMLINSON.

(Court of Common Pleas, 1871. 6 Com. Pl. 405.)

Action for money had and received, money paid, interest, and money found due upon accounts stated. Plea, never indebted.

The cause was tried before Willes, J., at the last assizes at Liverpool. The facts were as follows: The plaintiffs and the defendants were respectively cotton-brokers in Liverpool. In April, 1870, the plaintiffs bought of the defendants 74 bales of cotton ex Glen Cora, each acting for principals whose names were not disclosed, and according to the usage of the cotton-market each treating the others as principals in the transaction. Weight-lists of the cotton were in the ordinary course delivered to each party from the warehouse-keeper at Albert Dock; but a clerk of the defendants made a mistake of 100 cwt. in adding up the figures, and the consequence was that when the plaintiffs paid for the cotton they paid the defendants too much by £509. 15s. The mistake was not discovered until the 14th of December, when the plaintiffs demanded back that sum. The invoice for the cotton (which was delivered on the 22d of April) was headed as follows: "Messrs. Newall & Clayton, bought from W. D. Tomlinson

& Co." &c.; and it was not until after the discovery of the mistake that the plaintiffs were informed (as the fact was) that Messrs. Dixon & Co. were the defendants' principals.

In the meantime the defendants, who had previously to the arrival of the cotton, advanced very considerable sums to the shippers Messrs. Dixon & Co., had allowed the sum in question in their account with them, and had subsequently gone on making further advances; and when Dixon & Co. ultimately suspended payment, the balance due from them to the defendants on account of these transactions exceeded £2,000. The defendants thereupon claimed to be entitled to shelter themselves under the rule of law which protects payments bona fide made by an agent to his principal, without notice; and at the trial it was submitted on their behalf, that, being known to be brokers, and being under advances to their principals, whether the plaintiffs knew that they were acting for principals or not, they (the defendants) were entitled and bound to hand over the money to their principals, or (which was the same thing) entitled to set it off against their advances, and having done so, were not liable to be called upon to refund it.

The learned judge in his summings-up said that every agent for the sale of goods who has advanced money upon them and has them in his possession, has a right to sell them as owner, unless there be a countermand of his authority; and he distinguished the cases cited, on the ground that in both of them the persons who dealt with the agent knew that they were dealing with one who represented an undisclosed principal; whereas here the defendants, though general brokers, acted in the particular case as principals, and he directed the jury to find for the plaintiffs, damages £509. 15s., reserving leave to the defendants to move to enter a verdict for them, or a nonsuit, if the Court should think the ruling wrong.[31]

Quain, Q. C., moved accordingly.

Bovill, C. J. The defendants in the first instance personally claimed the price of the cotton from the plaintiffs as upon a sale to them by the defendants, each being, as between themselves, personally bound as principals in the transaction, though each were acting for principals whose names were not disclosed. The invoice was made out as upon a sale from the defendants to the plaintiffs, and claiming the price as being due to the defendants personally; and each was liable personally to the others for the due performance of the contract. The defendants were entitled to sue for and recover the price of the cotton in their own names, and to apply it when received to their own use and benefit. They had made large advances to their principals, Messrs. Dixon & Co., upon the security of the cotton, and were entitled to sell it to recoup themselves. In no sense could they be said to have received this money for the purpose of handing it over to Messrs. Dixon & Co.; nor did they in point of fact hand it over to

[31] The statement of facts is abridged.

them. It is true that the defendants were shewn to have made further advances to Messrs. Dixon & Co. subsequently to the receipt by them of this money. That, however, could not make it money had and received by Messrs. Dixon & Co. to the use of the plaintiffs, so as to enable them to sue Messrs. Dixon & Co. for it. The mistake originated with the defendants themselves, and they alone are responsible. The cases relied on are clearly distinguishable. In Shand v. Grant, 15 C. B. (N. S.) 324, the defendant received the money as agent of the shipowner, and for the purpose of handing it over to him. The case was put entirely upon the ground that the defendant was a mere agent. He had handed over the money to his principal, and the principal was the proper person to sue. So in Holland v. Russell, the same view was taken, and the decision proceeded upon the ground that the defendant was a mere agent. Cockburn, C. J., in delivering the judgment of the Court below, after stating what had been the contention on one side and on the other, says (1 B. & S. 424, at p. 432; 30 L. J. [Q. B.] 308, at p. 312): "We are of opinion that the plaintiff fails upon the facts. Not only is it clear that the defendant was acting solely as agent, but (the Court having power to draw inferences of fact) we are of opinion that the plaintiff was aware that the defendant was acting as agent for the foreign owners, and as such made to him the payment of the money he now seeks to recover back." And, when the case came before the Court of error, the same view was taken. Erle, C. J., delivering the judgment of that Court, says (4 B. & S. 14, at p. 15; 32 L. J. [Q. B.] 297, at p. 298): "The defendant who received this money from the plaintiff received it as agent for a foreign principal. The plaintiff knew that, and paid him in that capacity, with the intention that he should pay it over to that principal, and he did so; and all the money thus received has been accounted for in a settlement of account approved by the foreign principal, under circumstances which clearly amount to payment of that sum to him. The defendant having therefore been altogether an agent in the matter, is there anything which takes him out of the ordinary protection to which an agent is entitled who pays money to his principal before he received notice not to pay it, and before he knew that there was no legal duty on him to do so? There is nothing in this case to deprive the defendant of the right of an ordinary agent so to protect himself." Here the defendants were not mere agents. They were dealing as principals, and entitled to apply the proceeds of the sale of the cotton to their own use. For these reasons I am of opinion that the direction of the learned judge was right, and that there should be no rule.

Byles, J. I entirely agree with what has fallen from my Lord upon the first point. The defendants did not receive the money as mere agents: they received it for their own use and benefit. In addition, I would observe that the defendants here are seeking to excuse one mistake by another. They paid over (or accounted for) the money to their employers, if not with recollection, yet with notice of the facts.

If they were mere agents, they were bound to remember. On both grounds, therefore, I think the verdict was right.

MONTAGUE SMITH, J. I am of the same opinion. Upon the facts appearing, the defendants were not mere agents to receive the money for Dixon & Co., and to hand it over to them. They received it on their own account, and had a right so to receive it and to appropriate it to their own use. They were not mere conduit-pipes; they were in some sense principals, and had a right to appropriate the money in satisfaction of their advances to Dixon & Co., and they did so. What is said by Lord Mansfield in Buller v. Harrison, 2 Cowp. at p. 568, seems to me to be very much in point: "The law," he says, "is clear, that, if an agent pay over money which has been paid him by mistake, he does no wrong; and the plaintiff must call on the principal: and in the case of Muilman v. ———, where it appeared that the money was paid over, the plaintiff was nonsuited. But, on the other hand, shall a man, though innocent, gain by a mistake, or be in a better situation than if the mistake had not happened? Certainly not." If the argument of Mr. Quain were to prevail, the defendants clearly would be in a better position than if the mistake had not happened. They received the money and appropriated it towards satisfaction of their own debt. I think the defendants were not, to use the words of Erle, C. J., in Holland v. Russell, 4 B. & S. at p. 16, agents altogether. As between themselves and the plaintiffs, they were principals.

BRETT, J. I am of the same opinion. The defendants were originally liable because under a mistake they received money which they were not entitled to. They cannot get rid of that liability, unless they bring themselves within the rule as to an agent who has received money on account of his principal and has paid it over to him. It seems to me that they have failed to bring themselves within that rule. They did not receive this money for their principals. They stood with regard to the plaintiffs as original contractors. I should be sorry, however, to decide the case on that ground alone. The money in question was received by the defendants, not only as between the plaintiffs and themselves, but also as between Dixon & Co. and themselves, on their own account, and not on account of Dixon & Co. Being under advances, they had a right to sell the cotton and receive the proceeds on their own account. They cannot, therefore, say that they received the £509. 15s. in question to the use of their principals; and consequently they do not bring themselves within the rule relied on. I will only add that I found my judgment entirely upon that view, and I do not rely on the ground that the money was received by the defendants through a mistake of their own.

Rule refused.[32]

[32] In Continental Caoutchouc & Gutta Percha Company v. Kleinwort, Sons & Co. (1904) 15 L. T. R. 474, Collins, M. R., in the course of his opinion, said: "It is clear law that prima facie the person to whom money has been paid

DURRANT v. ECCLESIASTICAL COM'RS FOR ENGLAND AND WALES.

(Queen's Bench Division, 1880. 6 Q. B. Div. 234.)

Special case, stated by way of appeal from the judgment of the judge of the county court of Downham in favour of the plaintiff, in an action brought to recover back an amount of tithe commutation rent-charge paid to the defendants as rectors of the rectory of Crimplesham, under a mistake of fact.

The material facts appearing in the case were the following:

Prior to Michaelmas, 1870, certain lands in the parish of Crimplesham, in Norfolk, were held by a Mr. Hodgkinson as tenant. At Michaelmas, 1870, the plaintiffs succeeded Hodgkinson in his tenancy, except as to a part of the land called Stanks, consisting of about twenty-five acres, which was cut off and thenceforward held separately. The action was brought to recover back tithe which accrued due between the 10th of April, 1874, and the 1st of October, 1876, in respect of Stanks, and was paid by the plaintiff to the defendants.

The defendants became owners in possession of the tithe of the parish of Crimplesham on the 10th of April, 1874. The names of the persons for the time being occupying the respective hereditaments subject to the tithe were put down in the collecting book of the tithe owner's agent, which was used by the collector at the tithe audit. When Hodgkinson gave up his tenancy the name of the plaintiff was substituted in the collecting book of the then collector for that of Hodgkinson in respect of all the lands, including Stanks. From that time until April, 1874, the collector for the lessees, and afterwards the collector for the defendants, gave notices to the plaintiff, as an occupier of lands in the parish, to pay the tithe for the lands that appeared by the collecting book to be occupied by him, without any knowledge on his or their part that the plaintiff did not occupy the land called Stanks, or that the plaintiff was not liable to pay tithe for the same, being guided simply in the notices of audit by the list above mentioned.

The plaintiff paid his tithe according to the notices, in ignorance that the amount specified in the notices included the tithe for Stanks not occupied by him. The tenant of Stanks, who was liable under an agreement with the landlord to pay tithe, was not asked to pay for that land until after the plaintiff, in April, 1877, accidentally discov-

under a mistake of fact is liable to refund it, even though he may have paid it away to third parties in ignorance of the mistake. He has had the benefit of the windfall and must restore it to the true owner. On the other hand, it is equally clear that an intermediary who has received money for the purpose of handing it on to a third party, and has handed it on, is no longer accountable to the sender. In such case he is a mere conduit-pipe, and has not had the benefit of the windfall."

The authorities are collected in a note in 23 L. R. A. (N. S.) 553.

ered that he was paying tithe for land not in his possession, and refused to pay it any more.

The question for the opinion of the Court was whether, under these circumstances, the plaintiff was entitled to recover back any and what part of the tithe so paid by him to the defendants?

POLLOCK, B. I agree in the decision arrived at by the county court judge in favour of the plaintiff. If the mistake, which was common to both parties, had been discovered within a certain time after the payment the defendants could have obtained the tithe from the tenant. The fact that the mistake was not discovered in time prevents this, and so alters the position of the defendants; but there is no conduct on the part of the plaintiff such as would disentitle him from recovering in this action. In Cocks v. Masterman, 9 B. & C. 902, the ground of the decision was that the banker should bear the loss, because he had not done that which bankers are bound to do, given notice of the forgery of the cheque when it became due. This and other similar cases proceed upon the ground of some mutual relation between the parties creating a duty on the part of the plaintiff, breach of which disentitles him from recovering. No such state of facts exists here, and the plaintiff, having paid the money under a mistake of fact, is entitled to recover it back.

HAWKINS, J., concurred.

Judgment for the plaintiff.[33]

ATLANTIC COAST LINE R. CO. v. SCHIRMER.

(Supreme Court of South Carolina, 1910. 87 S. C. 309, 69 S. E. 439.)

Appeal from Common Pleas Circuit Court of Charleston County; C. G. Dantzer, Judge.

Action by the Atlantic Coast Line Railroad Company against C. C. Schirmer and another, copartners as Jacob S. Schirmer & Sons. From the judgment, plaintiff appeals.

The report of F. K. Myers, as master, referred to in the opinion, is as follows:

"To the Honorable the Court of Common Pleas:

"All issues of law and fact in this case were referred to the undersigned master by an order dated October 9, 1909. After taking testimony and hearing argument, I have reached the following conclusions of fact:

"On the 10th day of November, 1906, the defendants herein, C. C. Schirmer and William Schirmer, trading as Jacob S. Schirmer & Sons,

[33] Accord: Kingston Bank v. Eltinge (1869) 40 N. Y. 391, 100 Am. Dec. 516, (but see Ball v. Shepard [1911] 202 N. Y. 247, 95 N. E. 719); Houston & T. C. Ry. Co. v. Hughes (Tex. Civ. App. 1911) 133 S. W. 731.

See also Phetteplace v. Bucklin (1893) 18 R. I. 297, 27 Atl. 211.

in the city of Charleston, delivered to the plaintiff, Atlantic Coast Line Railroad Company, a shipment of rice valued at $31.25 for delivery to W. R. Wilson, at Statesboro, Ga. Schirmer filed a claim with the railroad company on December 28, 1906, for the value of the shipment, having previously requested that the goods be traced and notifying the railroad that consignee reported nondelivery. The claim of Schirmer was paid by the plaintiff company on May 20, 1907. On or about May 23, 1908, the railroad company informed Schirmer that this shipment had been delivered to consignee on the 26th day of November, 1906, and demanded a return of the amount of claim paid, which it now seeks to enforce in this case, on the ground of mistake.

"How did the mistake of facts arise resulting in this payment? Defendants had information from consignee that the shipment was not delivered, and transmitted that information to the railroad company, giving its source. The responsibility then rested upon the railroad company to trace the shipment and report delivery, if made, to defendants, so that they might enforce payment from consignee. With a denial of receipt from consignee, defendants had no method of ascertaining delivery except from the railroad company. Five months after the claim was filed, the railroad company paid the claim, and one year after payment notified the defendants that delivery had been made on November 26, 1906, and demanded a return of the money. The testimony shows that in the interim the consignee had gone out of business and moved away.

"I do not think it can be said in this case that the payment was made under a mistake of facts, because there was a duty upon the plaintiff to ascertain the facts, and more than reasonable time before the payment was made in which to do so.

"Nor is this a case in which there was 'no subsequent change in relative conditions.' Nor can defendants be said to have been paid money which they have no grounds in conscience to retain.

"I therefore respectfully recommend that the complaint be dismissed with costs."

HYDRICK, J.[34] The facts of this case are fully and clearly stated in the report of the master, F. K. Myers, Esq., whose report was confirmed and made the judgment of the circuit court. This being a case at law, the findings of fact below, having any testimony to support them, are not reviewable by this court. The conclusions of law based upon the facts found are correct. * * *

The correspondence between defendants and plaintiff's agent shows that, before the claim was paid by plaintiff, defendants called attention to their claim for this shipment several times, and asked for a report upon it, stating that the goods were sold on 30 days' time, that the shipment had already been out for 50 days, and that they had lately heard that the consignee was "in a bad way financially," and requesting the

[34] A portion of the master's report and a portion of the opinion are omitted.

"stoppage of delivery," if the goods should arrive at destination, as they would hold the road liable for them. Nearly four months after receiving this information, plaintiff paid the claim, and not until a year afterwards did it notify defendants of the delivery of the goods and demand return of the money. Defendants' testimony tended to show that the consignee had made prompt payment for all prior shipments, but had never paid for this one, and that, in the meantime, he had gone out of business and moved away from Statesboro, and defendants had been unable to locate him.

From these facts and circumstances, we cannot say that the finding that the relative situation of the parties had changed was wholly without testimony to support it. While even the negligence of one paying money under a mistake of facts should not, in all cases, preclude his recovering it, he will not be allowed to do so, if the situation of the party receiving it has thereby been materially changed so that his original position cannot be restored. 22 A. & E. Ency. L. (2d Ed.) 624. Affirmed.[35]

(D) Purchase for Value

MERCHANTS' INSURANCE CO. v. ABBOTT.

(Supreme Judicial Court of Massachusetts, 1881. 131 Mass. 397.)

GRAY, C. J.[36] These actions are in the nature of assumpsit for money had and received, with special counts alleging that the plaintiffs were induced to pay the money by fraud and mistake. The five cases were tried together, but are not exactly alike.

In the first action, which is brought by the Merchants' Insurance Company of Providence, R. I., against Charles W. Abbott and the members of the firm of Denny, Rice & Co., the material facts are shown by the report of the presiding justice and the special findings of the jury to be as follows:

On March 17, 1876, a woollen mill was destroyed by fire, upon the contents of which Abbott held a policy of insurance from the plaintiffs in the sum of $2,500, payable in sixty days after satisfactory

[35] Accord: Boas v. Updegrove (1847) 5 Pa. 516, 47 Am. Dec. 425; Ball v. Shepard (1911) 202 N. Y. 247, 95 N. E. 719, semble. In the latter case Werner, J., said: "There can be no recovery [of a payment made under mutual mistake of fact] if by reason of the payment the party receiving it has so changed his position to his prejudice that it would be unjust to require him to refund. Nat. Bank of Commerce v. Nat. Mechanics' Banking Ass'n (1873) 55 N. Y. 211, 213, 14 Am. Rep. 232, and Hathaway v. County of Delaware (1906) 185 N. Y. 368, 370, 78 N. E. 153, 13 L. R. A. (N. S.) 273, 113 Am. St. Rep. 909. If circumstances do exist taking such a case out of the general rule permitting a recovery, the burden of proving them rests upon the party resisting the repayment. Mayer v. Mayor, etc., of City of New York (1875) 63 N. Y. 455."

See also note, page 209, infra.

The authorities are discussed in 20 Harvard Law Review, 205.

[36] Portions of the opinion are omitted.

proofs and adjustment of loss, and providing that any fraud or false swearing in the proofs of loss should avoid the policy. Soon after the fire, Abbott made and delivered to the plaintiffs proofs of loss, and they after a reasonable investigation, which disclosed no grounds for a refusal to pay, and in ignorance of any fraud on Abbott's part, adjusted the amount of the loss in accordance with such proofs.

Denny, Rice & Co. offered evidence of the following facts: At the time of the fire Abbott was indebted to them in the sum of about $4,000. In the latter part of April, 1876, Abbott paid them about $1,500 in cash, and, as security for the payment of the rest of his debt, executed an instrument in writing under seal, by which, after reciting the issuing of the policy, and that a claim for loss had arisen under it, he assigned to them all his "claims upon said insurance company for loss under said policy," and authorized them to demand and sue for the same in his name, if necessary, and the proceeds to enjoy to their own use, and generally to do all and every act in and about the premises which he might do if this assignment had not been made.

In June, 1876, at the expiration of the sixty days allowed by the terms of the policy, the plaintiffs, in good faith, and not knowing of any fraud on Abbott's part, paid to Denny, Rice & Co. the amount of the loss as adjusted, and took a receipt signed by them in this form: "Boston, May 25, 1876. Received of the Merchants' Insurance Company of Providence $2,478.80 in full satisfaction and discharge of all claim for loss and damage under this policy by fire March 17, 1876, and this policy is hereby cancelled and surrendered." The sum so paid exactly extinguished the debt of Abbott to Denny, Rice & Company, and they never paid any part of it to him.

The mill and its contents, as the jury found, were burned with the knowledge and at the instigation of Abbott, and his proofs of loss were false and fraudulent. The plaintiffs did not learn that they had been defrauded until May, 1877, and then at once placed the case in the hands of legal counsel for investigation, and for prosecution if investigation should warrant it; and on January 16, 1878, brought this action. The other defendants had no knowledge of any fraud, nor was any demand for the money made upon them before this action was commenced.

On June 5, 1877, Abbott filed a petition in bankruptcy, and on October 3, 1877, obtained a certificate of discharge, and no dividend was paid out of his estate.

The justice presiding at the trial ruled that Abbott's certificate of discharge was no bar to this action; and, holding that the facts offered to be proved by the other defendants constituted no defence, directed a general verdict for the plaintiffs, and reported the case for such disposition and judgment as the full court should determine.

There can be no doubt of the liability of Abbott in this action. * * *

As to the other defendants a different question is presented. If, before receiving the money from the plaintiffs, they had known the true state of facts, and had participated in Abbott's fraud, they would have been liable to refund the money. Martin v. Morgan, 3 Moore, 635; s. c. 1 Brod. & Bing. 289; Gow, 123. Mason v. Waite, 17 Mass. 560. But the report states that there was no evidence offered, nor was it contended at the trial, that they had any knowledge of the fraudulent conduct of Abbott, but it was conceded that they were wholly innocent parties.

As to them, therefore, assuming the truth of the facts which they offered to prove, the case stands thus: They held a valid debt against Abbott. The assignment by Abbott to them was made in consideration of that debt, and to secure the payment thereof. The previous existence of the debt does not make the assignment the less a conveyance for value. Blanchard v. Stevens, 3 Cush. 162, 50 Am. Dec. 723; Culver v. Benedict, 13 Gray, 7; Ives v. Farmers' Bank, 2 Allen, 236; Railroad Co. v. National Bank, 102 U. S. 14, 58, 59, 26 L. Ed. 61. There is no question of the validity or of the genuineness of the assignment. Having been made after the fire, and after the amount of the loss had been adjusted between the plaintiffs and Abbott, it was in legal effect an assignment of a claim of Abbott upon the plaintiffs for a certain sum of money. That claim, not being negotiable in form, could not have been sued by these defendants except in Abbott's name, and subject to any defences which these plaintiffs had against him. But the plaintiffs, at Abbott's request, and without any suit, paid the amount of the loss, as adjusted between themselves and Abbott, directly to these defendants who were wholly ignorant and innocent of the fraud of Abbott.

The plaintiffs do not stand in the position of resisting a claim of Denny, Rice & Co. on an alleged promise of the plaintiffs, in which case Denny, Rice & Co. would have to prove a valid contract of the plaintiffs to pay to them or to Abbott, their assignor. But the plaintiffs are seeking to recover back from Denny, Rice & Co. a sum of money which the plaintiffs have voluntarily paid to them, and which the plaintiffs assert to be wrongfully withheld from them by these defendants, and which they are therefore bound to prove that, as between these parties, the plaintiffs have the better right to, and it is inequitable and unjust that these defendants should retain.

The only contract of the plaintiffs was with Abbott, and the only mistake was as between them and him. The money was voluntarily paid by the plaintiffs in discharge of Abbott's supposed claim upon them under their policy, and to these defendants as the persons designated by Abbott to receive it, and was in legal effect a payment by the plaintiffs to Abbott. These defendants received the money, not in satisfaction of any promise which the plaintiffs had made to them, (for the plaintiffs had made no such promise,) but under the agreement

of Abbott with these defendants that they might receive it from the plaintiffs and apply it to the satisfaction of Abbott's debt to themselves. In other words the money was paid by the plaintiffs to these defendants, not as a sum which the latter were entitled to recover from the plaintiffs, but as a sum which the plaintiffs admitted to be due to Abbott, under their own contract with him, and which at his request and in his behalf they paid to these defendants, who at the time of receiving it knew no facts tending to show that it had not in truth become due from the plaintiffs to Abbott. This payment by the plaintiffs to these defendants at Abbott's request was a satisfaction of Abbott's debt to these defendants, and might have been so pleaded by him if sued by them upon that debt. Tuckerman v. Sleeper, 9 Cush. 177. As between the plaintiffs and these defendants, there was no fraud, concealment or mistake. These defendants had the right to receive from Abbott the sum which was paid to them. The assignment which they presented to the plaintiffs was genuine, and was all that it purported to be. They hold the money honestly, for value, with the right to retain it as their own, under a title derived from Abbott, and independent of the fraud practiced by him upon the plaintiffs.

The case stands just as if the money had been paid by the plaintiffs to Abbott, and by Abbott to these defendants, in which case there could be no doubt that, while the plaintiffs could recover back the amount from Abbott, neither Abbott nor the plaintiffs could recover the amount from these defendants. The fact that the money, instead of being paid by the plaintiffs to Abbott, and by Abbott to these defendants, was paid directly by the plaintiffs to these defendants, does not make any difference in the rights of the parties. The two forms do not differ in substance. In either case, Abbott alone is liable to the plaintiffs, and these defendants hold no money which ex æquo et bono they are bound to return either to Abbott or to the plaintiffs. * * *

Judgment for the plaintiffs against Abbott alone.

STEPHENS v. BOARD OF EDUCATION.

(Court of Appeals of New York, 1879. 79 N. Y. 183, 35 Am. Rep. 511.)

Appeal from judgment of the General Term of the Supreme Court, in the second judicial department, in favor of plaintiff, entered upon an order overruling exceptions and directing judgment upon a verdict.

This action was brought to recover moneys alleged to have been received by defendant belonging to plaintiff.

The facts appear sufficiently in the opinion.

ANDREWS, J.[37] There is no dispute as to the material facts. On and prior to the 18th of December, 1871, one Gill was a member of

[37] A portion of the opinion is omitted.

the board of education of the city of Brooklyn, and, as attorney for said board, received $3,600.84, the money of the board, which he wrongfully converted and appropriated to his own use. Soon after the date mentioned, he procured from the plaintiff on a mortgage forged by him on the property of a third person $4,129.34 in a check of the plaintiff, which on the 21st of December, 1871, he deposited in a bank, to his credit, and on the same day drew his own check on the bank in which the deposit was made, to the order of the board of education for the amount of the money fraudulently appropriated by him, and delivered the same to the board, and the board thereupon credited the check to Gill in discharge of his debt. The check was paid in due course, and the money received thereon was used by the board in its business. The plaintiff, about two months thereafter, ascertained that the mortgage received from Gill was a forgery, and then demanded from the defendant the money received from Gill. The defendant had no notice, when it received the check from Gill, of the fraud by which he obtained the money of the plaintiff, nor had it any information as to the source from which the money to his credit in the bank was derived. The first information which the defendant had of the facts in respect thereto was at the time of the demand made by the plaintiff, before referred to.

The question is presented whether, under these circumstances, the plaintiff can maintain an action to recover the money received by the defendant from Gill and applied in payment of the debt owing by him to the defendant. We are of opinion that the action will not lie. The money having been obtained by Gill from the plaintiff by fraud and felony, the former acquired no title thereto, and the plaintiff could recover it from Gill if found in his possession, or he could follow it into the hands of any person who received it from Gill without consideration or with notice of the fraud by which he obtained it. The money when deposited by Gill in the bank was still the money of the plaintiff. The bank was a mere depository and while it so remained, the plaintiff could have compelled the bank to restore the money to him as the rightful owner. Tradesman's Bank v. Merritt, 1 Paige, 302; Mechanics' Bk. v. Levy, 3 Paige, 606; Pennell v. Deffell, 4 De Gex, M. & G. 372. But the bank, having paid it out on the check of Gill without notice of any defect in his title, was thereafter protected against any claim of the plaintiff therefor. The plaintiff, however, passing by the bank to whose possession the money first came from Gill, claims to recover of the defendant on the ground that the defendant, having received it from Gill in payment of an antecedent debt, cannot be permitted to retain it as against the plaintiff. No authority has been cited which sustains this position. The rule has been settled by a long line of cases, that money obtained by fraud or felony cannot be followed by the true owner into the hands of one who has received it bona fide and for a valuable consideration in due course of business. This, said Lord Holt in 1 Salk. 126, is "by reason of the course of trade which creates

a property in the assignee or bearer." And in Miller v. Race, 4 Burr. 452, Lord Mansfield said: "The true reason is upon account of the currency of it; it cannot be recovered after it has passed into currency."

No suspicion is cast upon the bona fides of the defendant. It received the money in the ordinary course of business, and for a good and valid consideration. The defendant had no connection with the fraud of Gill. He did not act or assume to act as the defendant's agent in the transaction with the plaintiff. The money was not obtained through or by means of his relation to the defendant. The position and rights of the parties are precisely the same as if Gill had not been a member of the board when the payment was made, or as if the debt which he paid had not originated in any violation of trust. It is said that the case is to be governed by the doctrine established in this State that an antecedent debt is not such a consideration as will cut off the equities of third parties in respect of negotiable securities obtained by fraud. But no case has been referred to where this doctrine has been applied to money received in good faith in payment of a debt. It is absolutely necessary for practical business transactions that the payee of money in due course of business shall not be put upon inquiry at his peril as to the title of the payor. Money has no ear-mark. The purchaser of a chattel or a chose in action may, by inquiry, in most cases, ascertain the right of the person from whom he takes the title. But it is generally impracticable to trace the source from which the possessor of money has derived it. It would introduce great confusion into commercial dealings if the creditor who receives money in payment of a debt is subject to the risk of accounting therefor to a third person who may be able to show that the debtor obtained it from him by felony or fraud. The law wisely, from considerations of public policy and convenience, and to give security and certainty to business transactions, adjudges that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in due course of business and in good faith upon a valid consideration. If the consideration is good as between the parties, it is good as to all the world. "Money," said Lord Mansfield, in Miller v. Race, before cited, "shall never be followed into the hands of a person who bona fide took it in the course of currency and in the way of his business." * * *

The judgment should be reversed and a new trial ordered. All concur.

Judgment reversed.[38]

[38] In Walker v. Conant (1888) 69 Mich. 321, 37 N. W. 292, 13 Am. St. Rep. 391, one Van Riper borrowed $1,000 from defendant upon the security of a note and real estate mortgage purporting to be executed by Van Riper's father upon the latter's farm, but in fact the note and the mortgage had been forged by the son. Subsequently the younger Van Riper, ostensibly on his father's behalf, negotiated with plaintiff for a loan of $3,000 to be secured by a mortgage on the same premises and agreed that $1,000 of such loan should be applied to the discharge of defendant's mortgage. Accordingly plaintiff paid defendant $1,000 and advanced to Van Riper $2,000, who delivered to plaintiff a second note and mortgage, purporting to be executed by his

III. Notice and Demand—Accrual of Cause of Action

WORLEY v. MOORE.

(Supreme Court of Judicature of Indiana, 1881. 77 Ind. 567.)

From the Monroe Circuit Court.

Elliott, C. J.[39] The first paragraph of the appellee's complaint alleges that a mistake was made in computing interest in the settlement of accounts between him and the appellant, and that, by reason of such mistake, he was induced to pay the appellant a much greater sum than was due him. Two points are made against this paragraph: First, that it is insufficient, because it does not show notice of the mistake to the appellant prior to the commencement of the action. Second, that it is insufficient, because it does not aver an offer to place the parties in the position they occupied at the time the settlement was made.

Of these in their order: First. This paragraph of the complaint does not aver that any notice of the mistake was given appellant prior to the time the action was commenced. It is argued by the appellant's counsel that he was entitled to notice of the mistake, in order that he might have an opportunity of rectifying it. There is much reason for

father, but in fact forged. Plaintiff and defendant both believed that both notes and mortgages were genuine. The forgeries having been discovered, plaintiff sued defendant to recover $1,000 on the ground that the same was paid under mutual mistake. A majority of the court held for the defendant, saying: "Stripped of all sophistry, the naked case is this: Van Riper obtains $3.000 of the plaintiff upon a forged mortgage, and, out of the money so obtained, pays Mrs. Conant the debt he owes her, which is evidenced by a forged note, and secured by a forged mortgage upon the same premises described in the mortgage to plaintiff. The money is honestly her due, and she has an equitable right to demand and receive it of Edgar [Van Riper]; and, believing her securities to be genuine and valid, she takes the money, and surrenders them up to him to be canceled and destroyed, and in utter ignorance of the fraud perpetrated upon the plaintiff by Van Riper. It is the same, in fact and in legal effect, in my opinion, as if the $3,000 had been paid direct to Van Riper by Walker and he had taken the money away, and out of it afterwards paid the debt to Mrs. Conant, and received the note and mortgage direct from her hands. In such case, it seems to me, under all the authorities, that the fact that the plaintiff or his agent supposed his bond and mortgage to be genuine, and the Conant mortgage to be a valid lien upon the premises, cuts no figure in the case. * * * He must bear the consequences of his own negligence, as the situation of Mrs. Conant has been changed by his acts so that in equity she cannot be asked to return the money. She received it in good faith, in satisfaction of a just and equitable claim, and when it was due, on honor and in conscience. Walker v. Conant (1887) 65 Mich. 197, 198, 31 N. W. 787, 788. And the authorities are uniform that where the money is received in good faith, and in the ordinary course of business, and for a valuable consideration, it cannot be recovered back because the money was fraudulently obtained of some other person by the payor. To hold otherwise would be to put every man who receives money in the due course of his business upon inquiry, at his peril, as to the manner in which such money was procured by the payor."

[39] A portion of the opinion is omitted.

holding that, where there is a mutual mistake, an action will not lie until the party receiving the money is put in default by notice and demand. There is no wrong in receiving the money, for there is neither breach of contract nor of duty. The wrong does not arise until notice of the mistake, and refusal or neglect to refund the money received by mistake. Bare justice requires that one who has been paid money by mistake, should have an opportunity of making reparation before he is vexed and harassed by litigation. The mistake was as much the fault of the one party as of the other, and both are upon the same footing. To destroy this equilibrium, something ought to be done by him who seeks to maintain an action. Thompson v. Doty, 72 Ind. 336.

The second objection is without force, for the reason that it does not appear that the appellee received anything to restore. * * *

Judgment reversed.[40]

SHARKEY v. MANSFIELD.

(Court of Appeals of New York, 1882. 90 N. Y. 227, 43 Am. Rep. 161.)

Appeal from judgment of the General Term of the city court of Brooklyn, entered upon an order made October 1, 1880, which affirmed a judgment in favor of defendant, and affirmed an order denying a motion for a new trial.

This action was brought to recover a balance alleged to be due for work and material in building a stone pier in the Gowanus canal.

Defendant set up as a counter-claim an over-payment made through mistake on his part as to the quantity of the work done, which mistake was not discovered until a measurement was made after the suit was commenced.

[40] Accord: Lawton v. Howe (1861) 14 Wis. 261; Southwick v. First National Bank of Memphis (1881) 84 N. Y. 420; Ford v. Brownell (1868) 13 Minn. 184 (Gil. 174).

In Lawton v. Howe, supra, the court said (page 252): "The complaint is defective in not alleging a demand of the money before the commencement of the action. This is matter of substance, and the defect is not waived by answering over. The money was received by the respondent as a payment, not as a loan; and it would be most unjust and oppressive to subject him to an action before demand, or notice that he is required to refund. Abbott v. Draper (1847) 4 Denio, 53. In most actions of this kind it will be found that a demand was made before they were commenced; and every principle of law and justice seem to require it."

As to what constitutes a sufficient demand, see Bishop v. Brown (1879) 51 Vt. 330, where Ross, J., said: "We do not think the law requires the use of any particular language, or any formal demand, before a suit can be brought. Whatever language gives him notice of the overpayment, and calls upon him to rectify the mistake, is sufficient. He does not hold the money by any contract, or right created by the party making the overpayment, which he must first terminate before a right of action accrues. The money all the time is the property of the party making the overpayment, but having come into the possession of the other party without his fault or knowledge, he is entitled to be notified of the fact that he has the money in his possession, and to be called upon to rectify the mistake before he is subject to a suit for its recovery."

FINCH, J.[41] This is not a case of money paid under a mutual mistake, where the action of each party was equally innocent. The mistake was that of the party who paid, and not at all that of the one who received the amount in dispute. The plaintiff was employed by the defendant to build a stone pier in the Gowanus canal. The precise terms of the contract, and the amount due for construction were sharply litigated on the trial; but the verdict of the jury establishes that there was an over-payment mistakenly made by the defendant. His right to recover back is resisted, mainly upon the ground that notice was not given and demand made of the over-payment, before setting up the counter-claim. Without stopping to consider whether the same rule applies to a defendant pleading an over-payment by way of counter-claim as that which governs a plaintiff suing for the same cause, and assuming the law to be identical in both cases[42] we are still of opinion that a demand was not a condition precedent to the defendant's right of action.

Two cases in this court are relied upon by the appellant. Mayor v. Erben, 3 Abb. Dec. 255; Southwick v. First Nat. Bank, 84 N. Y. 420. In the first of these cases no mistake was established, and that fact decided the case. The court added, "where money is paid under mutual mistake," demand, or at least notice of the error, must precede a right of recovery. In the latter case the mistake was mutual, and stress was laid upon the fact that the defendant "lawfully and innocently received the draft and the money thereon." The ground of these decisions is quite obvious. Where the mistake is mutual both parties are innocent, and neither is in the wrong. The party honestly receiving the money through a common mistake owes no duty to return it until at least informed of the error. It is just that he should have an opportunity to correct the mistake, innocently committed on both sides before being subjected to the risks and expenses of a litigation. It was said in Abbott v. Draper, 4 Denio, 53, that "when a man has paid money as due upon contract to another, and there is no mistake, and no fraud or other wrong on the part of the receiver, there is no principle upon which it can be recovered back until after demand has been made." While this language is not accurate as to a mistake on the part of a receiver, if that was the meaning intended, the doctrine is clearly recognized that where the receiver is guilty of fraud or other wrong in taking the money, he is not entitled to notice. The necessity of a demand does not therefore exist in a case where the party receiving the money, instead of acting innocently and under an honest mistake, knows the whole truth and consciously receives what does not belong

[41] The statement of facts is abridged and a portion of the opinion is omitted.

[42] In Stotsenburg v. Fordice (1895) 142 Ind. 490, 41 N. E. 313, 810, which was an action on a note to which defendant counterclaimed for an overpayment of interest thereon made by mutual mistake, it was held that "the suit of the appellant [plaintiff] excused the demand, if one was necessary."

to him, taking advantage of the mistake or oversight of the other party, and claiming to hold the money thus obtained as his own. In such case he cannot assume the attitude of bailee or trustee, for he holds the money as his own, and his duty to return it arises at the instant of the wrongful receipt of the over-payment. He is already in the wrong and it needs no request to put him in that position. Utica Bank v. Van Gieson, 18 Johns. 485; Andrews v. Artisans' Bank, 26 N. Y. 299; Dill v. Wareham, 7 Metc. (Mass.) 447; Southwick v. First Nat. Bank, 84 N. Y. 430.

This case is of that character. The receiver was not innocent. If he did not perpetrate a fraud, at least he committed a wrong. He knew all the facts and must be assumed to have known the law. He went to trial not admitting a mistake, but insisting that there was none. He charged a price beyond that to which he was entitled, or for quantities which were exaggerated, and obtained the money through the inadvertence and mistake of his debtor, who had not measured the work. He did not come rightfully by the excess. He took it as his own money, conscious of all the facts, and not only claimed to hold it as such, but sued to recover more. The case is not one in which he owed no duty until apprised of his mistake, for he made none. He took what was not his, knowing all the facts, and at the moment of its receipt it was his duty to return it. The action for money had and received could be at once maintained. * * *

The judgment should be affirmed with costs. All concur except TRACY, J., taking no part.

Judgment affirmed.[43]

BAKER v. COURAGE.

(Court of King's Bench. [1910] 1 K. B. 56.)

HAMILTON, J.[44] The question of law which I have to decide in this case is whether the Statute of Limitations, which is relied on by the plaintiff in reply, is an answer to the claim of the defendants, who seek to set off against the plaintiff's claim a sum of £1000. which was proved to have been paid by them to the plaintiff under a mistake of fact on March 31, 1896. The defendants have also counterclaimed for the same sum and interest. But no distinction was drawn in argument between capital and interest, and I shall treat the case as if the question

[43] "If the mistake was induced by the fraud of the party receiving the same, and he had knowledge of the overpayment at the time, or if he had subsequently discovered the mistake, the duty was then cast upon him to rectify the mistake and repay the money. Thereafter he knowingly has the money of the other party to the transaction in his hands, which he holds against equity and good conscience, and there is no apparent reason for any demand for the repayment of the money before suit." Bishop v. Brown (1879) 51 Vt. 330.

See also Sheppard v. Lang (1905) 122 Ga. 607, 50 S. E. 371; Dill v. Wareham (1844) 7 Metc. (Mass.) 438.

[44] The statement of facts and a portion of the opinion are omitted.

turned only upon what were the rights of the parties at the time the money was paid.

For the defendants two points were made—first, that the statute did not begin to run until the discovery of the mistake by the defendants,[45] and, secondly, that the statute did not begin to run until the cause of action was complete, and that the cause of action was not complete until the defendants had given the plaintiff notice of the discovery and demanded repayment of the money. * * *

It remains to deal with the defendants' second contention, that their cause of action was not complete until notice of the mistake had been given to the plaintiff and a demand had been made. It was said that the cause of action is in the nature of a breach by the payee of a duty to hand over money which ex æquo et bono does not belong to him, but belongs to the payor, and that there can be no breach of that duty where the facts which give rise to the duty have not been brought to the payee's attention. It is clear that if that is right the payor might postpone the notification of his discovery and the making of his demand for an unlimited time and yet not have the statute run against him. But I think that the contention is fallacious. It seems to me that the cause of action in this case was complete independently of any notification of the discovery. The mistake was one which Mr. Baker made as well as Messrs. Courage; it was common to both parties. Mr. Baker expected that the £1000. which the defendants had lent him to pay off the mortgagee would be repaid to them upon the completion of the purchase; he intended it to be done and took the £9000. in the belief that it had been done. Under those circumstances it does not appear to me that notice of the mistake was necessary to raise a duty in Mr. Baker to pay the overpayment back. It was money had and received to the use of the defendants because it was money for which there was no consideration.

Reliance was indeed placed by the defendants upon a case of Freeman v. Jeffries, L. R. 4 Ex. 189, the decision in which would bind me if the facts were the same, for both Martin and Bramwell, BB., held that the action there, which was an action for money paid by mistake, was not maintainable without previous demand. But in that case at the time the first instalment of the money was paid neither the plaintiff nor the defendant made any mistake. The mistake was made by the two valuers who were subsequently employed to value the farm which was the subject-matter of the sale. It was not until the plaintiff afterwards consulted a third valuer on his negotiating for the resale of the property that he discovered that the former valuers had included in their valuation certain items which they ought not to have included, and after this he paid over the balance of the money to the defendant at a time when he knew of the valuers' mistake but the defendant did not. It was under those circumstances that Martin and Bramwell,

[45] The court ruled against the defendants on the first point, on the ground that they had "means of knowledge" at or soon after the time of payment.

BB., held that there was no duty on the defendant to repay the excess valuation until after notice of the mistake, which was not his mistake and of which he was unaware. I think it is clear that they so decided without reference to a case in which not only the party paying paid under a mistake, but also the party receiving the money was under a mistake at the time when he received it. In my opinion, therefore, the case of Freeman v. Jeffries, L. R. 4 Ex. 189, does not support the contention of the defendants.

But then it was said that this principle of the necessity of notice and demand as a condition of the completion of the cause of action is of general application and applies to all cases in which the defendant is required to return something which has come innocently into his possession but which he is not entitled to keep. And reference was made to the case of Spackman v. Foster, 11 Q. B. D. 99, where the action was in detinue for certain title deeds. The defendant there had advanced money on the deposit of the deeds without notice of the want of title in the depositor. Twenty-three years later the owner of the deeds discovered their loss and brought the action to recover them. It was held that until the defendant was informed of the plaintiff's title his possession of the deeds was not adverse to the plaintiff, with the consequence that until then the statute did not begin to run. I do not think that that case has any application to the present case. There must be judgment for the plaintiff.

Judgment for the plaintiff.[46]

[46] Accord: Sturgis v. Preston (1883) 134 Mass. 372, page 117, infra. Rutherford v. McIvor (1852) 21 Ala. 750. (But Harold Bros. v. Weaver [1882] 72 Ala. 373, contains a dictum that a bill in equity to reform a deed because of mutual mistake will not lie unless a demand be proved or its omission excused.) Leather Manufacturers' Bank v. Merchants' Bank (1888) 128 U. S. 26, 9 Sup. Ct. 3, 32 L. Ed. 342.

In the case last cited—an action to recover the amount of a check paid to one presenting it with a forged indorsement of the payee's name—Gray, J., said: "One who, by presenting forged paper to a bank, procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine, and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money which, in equity and good conscience, has never ceased to be its property. It is not a case in which a consideration, which has once existed, fails by subsequent election or other act of either party, or of a third person; but there is never, at any stage of the transaction, any consideration for the payment. [Citations omitted.] Whenever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when in fact he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment, and the money remains, in equity and good conscience, the property of the payor, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the statute of limitations begins to run, immediately upon the payment."

A special rule obtains in Vermont: "When money is paid by mistake, a demand is sometimes necessary, sometimes not. When the payor is not in fault, and the payee receives the money in his own wrong, no demand is necessary." Varnum v. Highgate (1892) 65 Vt. 416, 26 Atl. 628, page 218, infra.

STURGIS v. PRESTON.

(Supreme Judicial Court of Massachusetts, 1883. 134 Mass. 372.)

COLBURN, J. In this case, the plaintiff contended, and offered to prove, that in the year 1871 he bargained with the defendant for a lot of land, for a certain sum a square foot; that the defendant stated the number of square feet in the lot; that the plaintiff relied wholly upon the defendant's statement, and had no reason to believe or suspect that there was any error in said statement; that he thereupon paid for the land accordingly, and took a deed thereof; that there was not the number of square feet of land in said lot that the defendant had represented; that he did not discover the deficiency until the year 1880, a short time before this action was brought, when he was preparing to build upon the lot; that immediately upon the discovery of the mistake, he notified the defendant thereof, and demanded repayment of the sum so overpaid, and brought this action to recover it. The plaintiff disclaimed all charges of fraud or fraudulent concealment on the part of the defendant.

One of the counts in the plaintiff's declaration was for money had and received. The defendant relied, as one defence to the action, upon the statute of limitations.

The plaintiff contended that an action for money had and received has always been treated, at common law, as being founded on equity, and that the decision in this case, whatever it ought to be, should be the same, whether it should be considered a decision at common law or in equity; and argued that, as in equity, in cases of mistake, the statute of limitations does not begin to run until the discovery of the mistake, this action is not barred by that statute.

The answer to this argument is, that, although an action for money had and received, in its spirit and object, resembles a suit in equity, it is still an action at law, within the statute of limitations; and, as all charges of fraudulent concealment are disclaimed, it is not within any exception to the statute. Gen. St. 1860, c. 155, §§ 1, 12.

The Commissioners on the Revised Statutes, in their note on chapter 120, § 11, say: "In many cases of implied assumpsits, and other suits on contracts, the cause of action may remain for a long time unknown to the plaintiff; but unless that knowledge was fraudulently concealed from him, it was never supposed that he could bring his action after the expiration of six years." See also Adams v. Ipswich, 116 Mass. 570; Bishop v. Little, 3 Greenl. (Me.) 405; Bree v. Holbech, Doug. 630; Banning on Limitations of Actions, 21. Indeed, under the facts in the case at bar, it would seem that, even in a suit in equity, the plaintiff's claim would be barred. Farnam v. Brooks, 9 Pick. 212, 245; but we have no occasion to decide this point.

The plaintiff further contended that his right of action did not

arise until after demand, which was not made until 1880, and that, for this reason, this action is not barred by the statute of limitations.

We are of opinion that the plaintiff's cause of action arose immediately upon the payment of the money, and that no demand was necessary. If the plaintiff should sustain his offer of proof, the defendant held, and claimed as his own, from the moment it was paid to him, money which in equity and good conscience he ought to have immediately repaid to the plaintiff. Dill v. Wareham, 7 Metc. 438; Earle v. Bickford, 6 Allen, 549, 83 Am. Dec. 651; Utica Bank v. Van Gieson, 18 Johns. (N. Y.) 485; Hawley v. Sage, 15 Conn. 52.

This case differs widely from those in which the defendant is in the rightful possession of money, making no claim to it as his own, but ready to pay it over to the rightful owner; in which it is held that no right of action arises, and that the statute does not begin to run until after a demand upon him by the party entitled to the money, and a refusal to pay it over to the rightful claimant. French v. Merrill, 132 Mass. 525; Jones v. McDermott, 114 Mass. 400. Judgment for the defendant.[47]

[47] TIME OF ACCRUAL OF CAUSE OF ACTION FOR MONEY PAID BY MISTAKE.—In accord with the rule laid down in the principal case—that in the absence of a fraudulent concealment by defendant the statute of limitations begins to run at the time of the payment, although the mistake was not discovered until some time afterwards—see Bree v. Holbech (1781) 2 Douglass, 654; Baker v. Courage [1910] 1 K. B. 56, semble; Richardson v. Bales (1899) 66 Ark. 452, 51 S. W. 321; Maxwell v. Walsh (1903) 117 Ga. 467, 43 S. E. 704, semble; Schultz v Board of Commissioners of Cass County (1883) 95 Ind. 323; Brown v. Edes (1853) 37 Me. 318; Ely v. Norton (1822) 6 N. J. Law, 187; State Hospital for the Insane v. Philadelphia County (1903) 205 Pa. 336, 54 Atl. 1032.

A fraudulent concealment by defendant takes the case out of the statute of limitations. Manufacturers' National Bank v. Perry (1887) 144 Mass. 313, 11 N. E. 81.

In some jurisdictions it is expressly provided in the statute of limitations that the cause of action shall not accrue until the mistake is discovered, but such statutes are generally construed to mean that the statute shall run from the time when by reasonable diligence the claimant ought to have discovered the mistake. Shain v. Sresovich (1894) 104 Cal. 402, 38 Pac. 51; West v. Fry (1907) 134 Iowa, 675, 112 N. W. 184, 11 L. R. A. (N. S.) 1191; German Security Bank v. Columbia Finance & Trust Co. (Ky. 1905) 85 S. W. 761; Peacock v. Barnes (1906) 142 N. C. 215, 55 S. E. 99.

This result has been reached in Texas without the aid of a special statutory provision, the court holding that, since the action to recover money paid by mistake is based upon equitable principles, the equitable doctrine should apply and the statute should not begin to run until the plaintiffs' discovery of the mistake (Emerson v. Navarro [1868] 31 Tex. 334, 98 Am. Dec. 534); or until the time when, by the exercise of reasonable diligence, plaintiff should have discovered the mistake (Standford v. Finks [1907] 45 Tex. Civ. App. 30, 99 S. W. 449).

This is the usual rule in equity. Brooksbank v. Smith (1836) 2 Y. & C. Ex. 58; Ainsfield v. More (1890) 30 Neb. 385, 402, 46 N. W. 828; Hall v. Graham (1911) 112 Va. 560, 72 S. E. 105, Ann. Cas. 1913B, 1257; Gould v. Emerson (1893) 160 Mass. 438, 35 N. E. 1065, 39 Am. St. Rep. 501. ("Where a mistake in paying money is to be corrected by a court of equity, the statute of limitations does not begin to run until the time when the mistake was discovered, or at any rate till the time when by the use of due diligence it ought to have been discovered.")

The above cited cases almost uniformly disregard the underlying question as to whether a demand is necessary to perfect the plaintiff's right to bring

SECTION 2.—SPECIFIC APPLICATIONS OF THE DOCTRINE

I. Mistake as to Existence of a Contract Between the Parties

TURNER v. WEBSTER.

(Supreme Court of Kansas, 1880. 24 Kan. 38, 36 Am. Rep. 251.)

Error from Montgomery district court.

Action brought by Webster against Turner and another, partners, to recover for services rendered the defendants. Trial at the January term, 1879, of the district court, and verdict and judgment for plaintiff. The defendants brings the case to this court.

Brewer, J. In an action commenced by plaintiffs in error, an attachment was issued, placed in the hands of the sheriff, and by him levied upon certain mill property. Pending the attachment proceedings, the sheriff, under direction of plaintiffs in error, employed defendant in error to watch the property; and this action was brought by defendant in error, plaintiff below, to recover for such services. That the sheriff was authorized by plaintiffs in error to employ defendant in error, and that the latter performed the services, are conceded facts. The dispute is as to the compensation. Webster claims that the contract price was three dollars per day, and that it was worth that amount, while Turner & Otis say that they authorized the sheriff to contract for only one dollar and a half a day, and the sheriff says that that was all he promised to pay. The misunderstanding seems to have arisen in this way: After the attachment, Turner & Otis requested the sheriff to find some one to guard the mill. Meeting Webster, he asked him what he would undertake the job for. He replied, one dollar and a half a day, and nights the same. The sheriff understood him to say and mean, one dollar and a half for each day of twen-

action for money paid by mistake. We may have, therefore, the inconsistent result, in several jurisdictions (e. g., Indiana), that while plaintiff cannot sue to recover money paid by mistake until he has first made a demand for the same, nevertheless, despite his ignorance that the mistake has been made, his right to sue is barred by expiration of the statutory period after the time of payment, even though he has never perfected that right by making a demand.

In Wyckoff v. Curtis (1894) 7 Misc. Rep. 444, 27 N. Y. Supp. 1012, this point was raised, and the court held that, since a demand was necessary in order to perfect plaintiff's right to recover money paid under mutual mistake, the statute of limitations did not begin to run until such demand had been made.

Interest.—"The general rule is that in all cases where the money of another is received or acquired by mistake merely, without fraud, interest does not run upon it until the party in whose possession it is, is put in default by a demand by the party to whom it is justly due, in which case, if the money be retained after demand, interest begins to run." Sibley v. County of Pine (1883) 31 Minn. 201, 17 N. W. 337; Leach v. Vining (1892) 64 Hun, 632, 18 N. Y. Supp. 822; Talbot v. National Bank of the Commonwealth (1880) 129 Mass. 67, 37 Am. Rep. 302.

ty-four hours, while plaintiff meant that amount for a day of twelve hours, and the same for the night-time, or three dollars for every twenty-four hours. The sheriff reported the offer to Turner & Otis as he understood it, and they, after some hesitation, told him to accept the offer and employ Webster. Without further words as to the price, the sheriff gave the key of the mill to Webster, and told him to go ahead.

Now, the contention of plaintiffs in error is that the case turns on the law of agency; that they never personally employed Webster; that the sheriff was only a special agent with limited powers, only authorized to bind them by a contract to the amount of one dollar and fifty cents per day of twenty-four hours; that Webster is chargeable with notice of the extent of the sheriff's authority, and can enforce the contract as against the plaintiffs in error to the extent only of such authority. For any contract beyond that amount, the special agent binds himself alone, and not the principal. On the other hand, the defendant in error contends that, where services are contracted for and rendered, and no price stipulated, the law awards reasonable compensation therefor, and that, where there is a misunderstanding as to the price, the one party understanding it at one sum and the other at a different, there is no stipulation as to the price, and that it makes no difference whether the contract be made through an agent or with the principal directly. In the case at bar, he contends that it is immaterial that the conversation and misunderstanding were with the sheriff,—the agent,—and that the rule is just the same as though the talk and misunderstanding had been with Turner & Otis personally.

We think the case rests upon the propositions advanced by the defendant in error. It will not be questioned that, where the minds of two contracting parties do not come together upon the matter of price or compensation, but do upon all other matters of the contract, and the contract is thereupon performed, the law awards a reasonable price or compensation. Thus, where shingles were sold, and delivered, at $3.25, but there was a dispute as to whether the $3.25 was for a bunch or for a thousand, it was ruled that, unless both parties had understandingly assented to one of those views, there was no special contract as to price. Greene v. Bateman, 2 Woodb. & M. 359, Fed. Cas. No. 5,762. It is said by Parsons, in his work on Contracts, (volume 1, p. 389,) that "there is no contract unless the parties thereto assent; and they must assent to the same thing, in the same sense." Here, Webster never assented to a contract to work for $1.50 a day. He agreed to do a certain work, and did it; but his understanding was that he was to receive $3 per day. Turner & Otis employed him to do that work, and knew that he did it; but their understanding was that they were to pay but $1.50 a day. In other words, the minds of the parties met upon everything but the compensation. As to that, there was no aggregatio mentium. What, then, should result? Should he receive nothing, because there was no mutual assent to the com-

pensation? That were manifest injustice. Should his understanding bind both parties? That were a wrong to them. Should theirs control? That were an equal wrong to him. The law, discarding both, says a reasonable compensation must be paid. So that if the negotiation had been between the parties directly, and this misunderstanding had arisen, the rule of reasonable compensation would unquestionably have obtained. Now, how does the law of agency interfere? The proposition of law advanced by counsel for plaintiff in error, that a special agent binds his principal to the extent only of the authority given, and himself by any promise in excess, is clear. But the agent made no promise in excess of his authority. He promised that which he was authorized to promise. Because the other party misunderstood the extent of the promise, is surely no reason for holding the agent bound for more than he did in fact promise. The agent has rights as well as the principal. The work is not done for his benefit. He has discharged his agency in good faith, and to the best of his ability. Why should he be mulcted in any sum on account of the misunderstanding of the party with whom he contracted? If compensation were given on the basis of his promise, then, if his promise was in excess of his authority, he should be responsible for the excess; but where the promise is ignored, and compensation given on the basis of value alone, he should not be charged with the excess of such value above his authority. An agent is responsible for good faith. That is not questioned. He does not insure, either to his principal or the opposite party. Acting in good faith, and to the best of his ability, we can see no reason for making him responsible for any mere misunderstanding. Justice is done to all parties by ignoring any promise or understanding as to compensation, and giving to the laborer reasonable compensation for the work done, and requiring the party receiving the benefit of such work to pay a just and reasonable price therefor.

The case was submitted to the jury upon this basis, and while the instruction asked by plaintiffs in error, and refused, was unquestionably good law in the abstract, and while some criticism might fairly be placed upon one of the instructions given, and upon the answers of the jury to two special questions, we think the main question was fairly presented, and that no error appears justifying a reversal of the judgment, and it will be affirmed. All the Justices concurring.[48]

[48] In Vickery v. Ritchie (1909) 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810, Knowlton, C. J., said: "This is an action to recover a balance of $10,467.16 alleged to be due the plaintiff as a contractor, for the construction of a Turkish bath house on land of the defendant. The parties signed duplicate contracts in writing, covering the work. At the time when the plaintiff signed both copies of the contract, the defendant's signature was attached, and the contract price therein named was $33,721. When the defendant signed them the contract price stated in each was $23,200. Until the building was completed, the plaintiff held a contract under which he was to receive the larger sum, while the defendant held a contract for the same work, under which he was to pay only the smaller sum. This resulted from the fraud of the architect who drew the contracts, and did all the business and made all the payments for the de-

STONG v. LANE.

(Supreme Court of Minnesota, 1896. 66 Minn. 94, 68 N. W. 765.)

Appeal by defendant from an order of the district court for Hennepin county, Smith, J., denying a motion for a new trial, after a verdict in favor of plaintiff for $104.08.

MITCHELL, J. While the amount in controversy is small, the principle involved is important. The facts are practically undisputed. The plaintiff being desirous of purchasing a lot as a site for a dwelling, a mutual acquaintance of the parties (but for whose acts defendant was in no way responsible) pointed out to plaintiff a lot which he said defendant had for sale. The lot thus pointed out fronted east on Third avenue south, being the second lot north from Franklin avenue, in Minneapolis. The party was mistaken. The lot which defendant had for sale (as agent for the owner) was the one directly opposite on the other side of Third avenue, being the side "Judge Jones' house is on." This lot fronted west. It was also the second lot north from Franklin avenue, but, as already stated, on the opposite side of Third avenue from the one pointed out to plaintiff. Thereupon plaintiff went to see defendant. The precise words by which he opened negotiations do not clearly appear, but their substance was that plaintiff either asked defendant if he had for sale a lot on Third avenue south, or stated that a lot had been pointed out to him by this mutual acquaintance

fendant. The contracts were on typewritten sheets, and it is supposed that the architect accomplished the fraud by changing the sheets on which the price was written, before the signing by the plaintiff, and before the delivery to the defendant. The parties did not discover the discrepancy between the two writings until after the building was substantially completed. Each of them acted honestly and in good faith, trusting the statements of the architect. * * * The plaintiff and defendant were mistaken in supposing that they had made a binding contract for the construction of this building. Their minds never met in any agreement about the price. The labor and materials were furnished at the defendant's request and for the defendant's benefit. From this alone the law would imply a contract on the part of the defendant to pay for them. The fact that the parties supposed the price was fixed by a contract, when in fact there was no contract, does not prevent this implication, but leaves it as a natural result of their relations. Both parties understood and agreed that the work should be paid for, and both parties thought that they had agreed upon the price. Their mutual mistake in this particular left them with no express contract by which their rights and liabilities could be determined. The law implies an obligation to pay for what has been done and furnished under such circumstances, and the defendant, upon whose property the work was done, has no right to say that it is not to be paid for. The doctrine is not applicable to work upon real estate alone. The rule would be the same if the work and materials were used in the repair of a carriage or of any other article of personal property, under a supposed contract with the owner, if, through a mutual mistake as to the supposed agreement upon the price, the contract became unenforceable." The court further held that the measure of plaintiff's recovery should be the market value of the labor and materials furnished by him rather than the increase in the market value of the defendant's land by reason of the structure which plaintiff put upon it. For a discussion of this latter point, see Fabian v. Wasatch Orchard Co., page 331, infra.

as one that defendant had for sale, and inquired the price. The evidence is undisputed that defendant told plaintiff that he had for sale the lot on Third avenue south, being the second lot north of Franklin avenue, and "on the same side of the street Judge Jones' house was on." Nothing was said as to whether the lot fronted east or west. It is undisputed that Judge Jones' house is on the east side of Third avenue, and hence that a lot on that side would front west.

Without defendant's giving any further or more definite description of the lot, and without plaintiff making any further inquiry as to its description and location, the plaintiff proceeded to negotiate as to price. The result was a verbal bargain of sale and purchase for $2,500, of which plaintiff paid down $100, the balance to be paid when the title was ascertained to be satisfactory, and upon defendant's procuring the proper deed. It appears that defendant's arrangement with the owner of the lot was that he was to have as his commission all he sold the lot for over $2,400. But, without waiting for the sale to plaintiff to be consummated, defendant immediately went to the owner, and himself bought the lot for $2,400, paying on the purchase price the $100 which he had received from plaintiff, and taking a deed running directly to the plaintiff. Very soon afterwards, on submitting to his counsel the abstract of title furnished by the defendant, plaintiff discovered that the lot described in it was not the lot which had been pointed out to him, and which he supposed he was buying. He then informed the defendant of his mistake, and demanded back his $100, which defendant refused to pay, but tendered a deed which plaintiff refused to accept, and then brought this action to recover back the $100.

The evidence is undisputed that plaintiff was laboring under an honest mistake, and supposed he was buying the lot which had been pointed out to him. It is also undisputed that defendant was equally honest in supposing he was selling the lot on the other side of the street, for which he was agent, and that he had no notice of plaintiff's mistake. It will be observed that the description of the two lots was the same except the reference to "the side of the street Judge Jones' house is on," which was applicable to the lot defendant had for sale, but inapplicable to the one which plaintiff supposed he was buying. It is familiar law that an honest mistake of one of the parties may be good ground for refusing specific performance, and leaving the other party to his action for damages, while it would be no ground for a rescission of the contract. But the question here is whether, upon the facts, plaintiff is entitled to a rescission, for that is, in effect, what he is asking for in seeking to recover the $100.

The trial judge instructed the jury to the effect that, to constitute a contract, the minds of the parties must have met,—that is, as applied to this case, both parties must have had in mind the same lot; that if one of them referred to one lot, and the other to another lot, then there was no meeting of the minds of the parties, and hence no con-

tract. Considered as a statement of the general rule of law, this might be incomplete and even incorrect. If there be a meeting of the minds upon the terms of the contract, and those terms are free from ambiguity, and there be no fraud or misrepresentation, a mistake of one of the parties only, resting wholly in his own mind, as to the identity of the subject-matter of the contract, was never held in any well-considered case to be a ground for rescission. If it was, then all contracts would rest on a very uncertain foundation.

Undoubtedly, in order to create a contract, the minds of the parties must meet and agree upon the expressed terms of the contract. Thus, in Rupley v. Daggett, 74 Ill. 351, one party offered to sell a horse for $165; the other party understood him to say $65. It was held that there was no contract. To the same head may be referred cases where a person, by mistake, enters into a different kind of agreement from that which he intended to make or supposed he was making; as where he signed a bond supposing it to be a mere petition, or which he supposed he was signing merely as a witness. See Thoroughgood's Case, 2 Coke, 9; Foster v. MacKinnon, L. R. 4 C. P. 704. To the same general principle may be referred those cases where, after the parties have apparently agreed to the terms of a contract, it is made to appear that there was a latent ambiguity in an essential word, by which one of the parties meant one thing, and the other a different thing, the essential word being applicable to both. See Raffles v. Wichelhaus, 2 Hurl. & C. 906; Kyle v. Kavanagh, 103 Mass. 356, 4 Am. Rep. 560. In all these cases it was held there was no binding contract, because the minds of the parties had never met on its terms. But suppose, in Raffles v. Wichelhaus, there had been but one ship named Peerless, and hence no latent ambiguity in the terms of the contract; the defendant could not have been released from his contract merely because he had in mind, and supposed he was contracting with reference to, another ship of a different name. This distinction is very clearly brought out by both Mr. Anson and Mr. Lawson in commenting on this very case. Anson, Cont. 130; Lawson, Cont. § 214. We call attention to this distinction because we do not wish to be understood as indorsing the erroneous meaning not infrequently attached to the legal maxim that, to create a contract, the minds of the parties must meet and "agree on the same thing in the same sense."

Returning now to the facts of the present case, we note, in the first place, that this contract was not enforceable, because within the statute of frauds. Defendant or his principal might have repudiated it, and returned the $100. This of itself is no ground for rescission, but we think it furnishes a reason why the rules of law on the subject should be somewhat liberally applied in favor of the plaintiff.

Had the parties, in their contract, deliberately agreed on a formal description of its subject-matter, the mere fact that plaintiff was mistaken as to the lot to which that description applied, and had in mind another lot of a different description, would be no ground for a

rescission. But in this case, while the description given by the defendant was probably sufficient in law to identify the property, it was an unusual and exceedingly informal one, and one very liable to be misunderstood. It was in one sense incomplete, for on its face it did not appear on which side of the street Judge Jones' house was, which was the only thing contained in the description to distinguish the one lot from the other. The other elements of the description being common to both lots, and the plaintiff naturally assuming that the lot referred to was the one that had been pointed out to him, the reference to Judge Jones' house was not calculated to make any particular impression on his mind, as being a material part of the description. Again, the description given by the defendant was never expressly agreed to by the plaintiff. So far as it could be said to have been assented to at all, it was only impliedly by plaintiff's proceeding to negotiate as to price, which he evidently did supposing that the lot to which defendant alluded was the one which had been pointed out to him on the ground. Therefore, under the particular facts of this case, it may be fairly said that the minds of the parties never really met or agreed on the words or the terms of the contract, and hence that there never was any binding agreement.

The main contention of the defendant, however, is that, on the faith of the agreement, he had changed his situation by paying over the money to the owner of the lot, and therefore plaintiff is estopped to allege his mistake and claim a return of his money. If defendant had continued to occupy the relation of agent, and, as such, paid over to his principal the $100 as the money of the latter, this contention would be correct. But this is not what defendant did. He terminated his agency, and converted himself into a principal, by purchasing the lot, and applying the money, as his own, in part payment of the purchase price. We cannot see that, from a legal standpoint, he occupies any different position than he would if he had appropriated the money to any other use of his own, as, for example, buying a horse or paying a debt.

We find no prejudicial error either in the rulings of the court on the admission of evidence or in his charge to the jury. Order affirmed.[49]

[49] In Tyra v. Cheney (1915) 129 Minn. 428, 152 N. W. 835, plaintiff submitted to the defendant an oral bid to do certain construction work for defendant, a contractor, for $4,025. Defendant told plaintiff to put his bid in writing, and thereafter accepted it by telling plaintiff to go ahead with the work. The written bid was $963 less then the oral bid, plaintiff having mistakenly left out an item of that amount. Defendant (as the jury found) was aware of the plaintiff's mistake and consequently did not accept the written bid in good faith. The court upheld a recovery to the amount of the reasonable value of the work done less certain admitted payments; Holt, J., saying: "If cognizant of the mistake in plaintiff's bid, and that the latter was unaware of its occurrence, defendant had no right to claim that, when he told plaintiff to go ahead with the work, their minds met upon the price mistakenly stated in the bid. Nor should plaintiff be allowed to profit by his own mistake, so as

MARTIN v. SITWELL.

(Court of King's Bench, 1692. 1 Show. 156.)

Indebitatus assumpsit for £5. received by the defendant to the plaintiff's use, non assumpsit pleaded.

Upon evidence it appeared that one Barksdale had made a policy of assurance upon account for five pounds premium in the plaintiff's name, and that he had paid the said premium to the defendant, and that Barksdale had no goods then on board, and so the policy was void, and the money to be returned by the custom of merchants.

At the trial I urged these two points. First, that the action ought to have been brought in Barksdale's name, for the money was his, we received it from him, and if the policy had been good it would have been to his advantage; and upon no account could it be said to be received to Martin's use, it never being his money. Besides, here may be a great fraud upon all insurers, in this, that an insurance may be in another man's name, and if a loss happen then the insurer shall pay, for that some cestuy que trust had goods on board: if the ship arrive, then the nominal trustee shall bring a general indebitatus for the premium, as having no goods on board.

To all which HOLT, Chief Justice, answered, that the policy being in Martin's name, the premium was paid in his name and as his money, and he must bring the action upon a loss, and so upon avoidance of the policy for to recover back the premium. And as to the inconveniences it would be the same whosoever was to bring the action, and therefore the insurers ought with caution to look to that beforehand.

Then secondly, I urged that it ought to have been a special action of the case upon the custom of merchants, for this money was once well paid, and then by the custom it is to be returned upon matter happening ex post facto. I argued if the first payment were made void, then the law will construe it to be to the plaintiff's use, and so an indebitatus assumpsit will lie. But when a special custom appoints a return of the premium, an indebitatus lies not, as for money received to the plaintiff's use, but a special action of the case upon that particular custom.

To which HOLT, Chief Justice, answered me with the case adjudged by Wadham Wyndham, of money deposited upon a wager concerning a race, that the party winning the race might bring an indebitatus for money received to his use, for now by this subsequent matter it is become as such. And as to our case the money is not only to be returned by the custom, but the policy is made originally void, the

to hold defendant to the oral bid. There was a failure to enter a binding contract. One cannot snap up an offer or bid knowing that it was made in mistake."

party for whose use it was made having no goods on board; so that by this discovery the money was received without any reason, occasion, or consideration, and consequently it was originally received to the plaintiff's use.

And so judgment was for the plaintiff against my client.[50]

JONES v. INSURANCE CO. OF NORTH AMERICA.

(Supreme Court of Tennessee, 1891. 90 Tenn. 604, 18 S. W. 260, 25 Am. St. Rep. 706.)

Appeal from chancery court, Knox county; H. R. Gibson, Chancellor.

Action by Jones & Abbott against the Insurance Company of North America to recover premiums paid on a policy issued by defendant. Judgment for defendant, and plaintiffs appeal.

LURTON, J. The fire policy issued by the defendant company on lumber owned by the complainants contained in its written part a warranty that a continuous clear space of 150 feet should be maintained between the lumber insured and the saw-mill, dry-kiln, or any wood-working or manufacturing establishment, and that said space should not be used for the handling or piling of lumber thereon. This warranty was untrue when made, and untrue when the insured property was burned by fire communicated from a saw-mill within the space provided for. The contract of insurance is a conditional one. If no risk attaches, no premium, in the absence of fraud, is earned. When the risk never attached, and no risk was ever run, the premium is to be returned in case it has been paid, and the assured was guilty of no fraud. May, Ins. § 4.

The language of Lord Mansfield in Tyrie v. Fletcher, Cowp. 668, was that, when the risk had not been run, whether its not having been run was owing to the fault, pleasure, or will of the insured, or to any other cause, the premium shall be returned.

The facts of this case show no intentional fraud on the part of the assured, and his premiums, never having been earned, must be returned. Other points in this case were disposed of orally. Judgment reversed.[51]

[50] In McCulloch v. Royal Exchange Assurance Co. (1813) 3 Campbell, 406, it was held that it was too late for plaintiff to sue for the return of his premium on the ground that no risk was run, after the completion of the voyage. But see Steinback v. Rhinelander (1803) 3 Johns. Cas. (N. Y.) 269.

[51] "Where there is fraud, there is no return of premium, but upon a mere misrepresentation without fraud, where the risk never attached, there must be a return of premium." Per Gibbs, J., in Feise v. Parkinson (1812) 4 Taunton, 640.

VAN DEUSEN v. BLUM.

(Supreme Judicial Court of Massachusetts, 1836. 18 Pick. 229, 29 Am. Rep. 582.)

This was an action of debt. The declaration contained two counts upon a special contract under seal, a third upon a quantum meruit for labor performed, and a fourth upon a quantum valebant for materials furnished. The defendant Blum was defaulted; the other defendant, Thouvenin, appeared, and to the two first counts he pleaded non est factum, and to the third and fourth, nil debet.

At the trial, before Morton, J., the plaintiffs produced the contract, purporting to be between themselves of the one part, and Blum and Thouvenin of the other part. Blum and Thouvenin were partners, and were so described in the contract. The plaintiffs had duly executed the contract, and Blum also had executed it by signing the company name "J. C. Thouvenin & Co.," and annexing a seal. There was no evidence that he had any authority to execute the contract in behalf of Thouvenin, or that Thouvenin was present at the execution or ever ratified it.

The judge ruled, that the instrument could not go in evidence to the jury as the deed of Thouvenin.

The contract was for building a dam by the plaintiffs for Blum and Thouvenin, across the Housatonic river; which was a purpose within the scope of the partnership business. The plaintiffs offered to prove that they built the dam and furnished the materials therefor, and they claimed against Thouvenin, under the third and fourth counts, what their work and materials were worth. Thouvenin objected to the admission of this evidence, and contended that there being an express contract executed by the plaintiffs and Blum, and that contract being in force and binding upon Blum, the plaintiffs' remedy was on that instrument alone.

But the judge ruled, that the plaintiffs might, notwithstanding that contract, recover under the third and fourth counts, upon an implied promise, for all the materials furnished and labor performed before the dissolution of the partnership.

Thouvenin and Blum dissolved partnership on the 10th of November, 1832, and all the partnership property was conveyed to Blum, and he agreed to pay all the partnership debts. The dam was not finished until after the 10th of November, and for the work done previously to that day the jury found a verdict against Thouvenin.

The questions arising upon these facts were reserved for the consideration of the whole Court.

MORTON, J., delivered the opinion of the Court. Debt, as well as assumpsit, will lie on a quantum meruit or a quantum valebant. 1 Chit. Pl. 107; 2 Wm. Saund. 117 b, note; Union Cotton Manufactory v. Lobdell, 13 Johns. (N. Y.) 462. Hence these counts may well be

joined with counts upon a specialty. Smith v. First Congr. Meetinghouse in Lowell, 8 Pick. 178.

It was long doubted, whether a man, who performed work in consequence of a special contract, but not in conformity to it, could recover for the services rendered and materials found. There are many and conflicting authorities on the subject. They have all been carefully examined and compared, and the rule established by our Court, as we think, according to the principles of justice and the weight of authority. He who gains the labor and acquires the property of another, must make reasonable compensation for the same. Hayward v. Leonard, 7 Pick. 181, 19 Am. Dec. 268; Smith v. First Congr. Meetinghouse in Lowell, 8 Pick. 178; Munroe v. Perkins, 9 Pick. 298, 20 Am. Dec. 475; Brewer v. Tyringham, 12 Pick. 547.

The general authority derived from the relation of partnership, does not empower one partner to seal for the company or to bind them by deed. It requires special power for this purpose. See Cady v. Shepherd, 11 Pick. 400, 22 Am. Dec. 379, and the cases there cited. Here was no evidence of any previous authority or subsequent ratification. The sealed instrument executed by one partner in the name of the firm, might bind him, but could not be obligatory upon the company. And although the plaintiffs might have had a remedy upon the contract against the party who executed it, yet they were not bound to rely upon him alone.

The services never were rendered either in conformity to or under such an agreement. The plaintiffs undertook to execute a contract between themselves and the company. But there being no such contract in existence, they are left to resort to their equitable claim for their labor and materials. So far as these benefited the company, the plaintiffs are entitled to recover against them.

Judgment on the verdict.[52]

[52] In Bond v. Aitkin (1843) 6 Watts & S. (Pa.) 165, 40 Am. Dec. 550, the plaintiff, having lent money to a partnership, taking the sealed obligation of one of the partners, sued both partners in action of debt on the instrument, with a count in money lent. As to the liability on the latter count of the partner who had not signed the obligation, the court said: "On the additional count, we think the plaintiff has not shown a right to recover. Where the bond of one of the partners is taken for an antecedent partnership debt, it may be considered either as payment and extinguishment of such debt, or only a collateral security, according to the nature of the transaction and the circumstances attending it. Wallace v. Fairman (1835) 4 Watts (Pa.) 378. But where there is no antecedent debt, but the bond of one partner is taken at the time money is loaned to the partnership, and as the consideration for loaning the money, it can hardly be treated as a collateral security. It must be considered as all one transaction, and the bond as the only security contemplated; unless, perhaps there were strong and positive evidence to show an express agreement to the contrary by all parties. If so, then in this case the bond was the only debt; the plaintiff, if he recovered at all, must recover on it, and not on the money counts. And as there was no implied contract by both, so the express promise proved was only by one; and, therefore, we are of opinion the charge of the court below was correct, that the plaintiff could not recover on the additional count."

NATIONAL GRANITE BANK v. TYNDALE.

(Supreme Judicial Court of Massachusetts, 1900. 176 Mass. 547, 57 N. E. 1022, 51 L. R. A. 447.)

Exceptions from superior court, Norfolk county.

The first case was an action at law by the National Granite Bank against one Tyndale, administrator, upon three promissory notes, each in the sum of $5,000, executed by Isabella S. Whicher, the defendant's intestate, payable to the order of the intestate's husband and indorsed by him. The declaration contained counts upon the notes and also counts for money loaned to the defendant's intestate, for money had and received, etc. The second case was a bill in equity between the same parties and involving the same transaction. From a judgment in favor of defendant, and a decree in favor of defendant sustaining a demurrer to the bill, complainant excepts.

MORTON, J.[53] These two cases were argued together. The first is an action at law, and was before this court on the defendant's exceptions in Bank v. Whicher, 173 Mass. 517, 53 N. E. 1004, and it was there held that, the maker of the notes being a married woman, and the notes being made payable to the order of her husband, and indorsed by him, no action could be maintained on them against her.[54] It comes before us now on exceptions by the plaintiff to a ruling by the presiding justice that upon the plaintiff's offer of proof an action could not be maintained against the administrator on the common counts for money lent, or for money had and received, and to a ruling that the plaintiff was not entitled to avail itself of the facts set up in the bill in equity in answer to the defense that the notes were void because made payable to the husband of defendant's intestate. The plaintiff offered to show that on December 29, 1891, it lent the defendant's intestate $15,000, and that at the same time the defendant's intestate gave the plaintiff three promissory notes for $15,000, payable to the order of her husband, and indorsed by him and by two other parties; that subsequently the defendant's intestate repudiated the notes on the ground that, having been made payable to her husband, and indorsed by him, they were void; and that the plaintiff had expressly refused to make the loan to the other parties, or on their individual credit, and made the loan only to defendant's intestate, and on her credit.

We think that the ruling was erroneous. The offer was to show that the loan was made to defendant's intestate, and on her credit. This was consistent with the form of the note, of which she was the

[53] The statement of facts is abridged and a portion of the opinion is omitted.

[54] "That such a note is void at common law, which law has not been changed by our statutes relating to married women, is too plain for argument." National Granite Bank v. Whicher (1899) 173 Mass. 517, 53 N. E. 1004, 73 Am. St. Rep. 317.

maker, and the other parties were, as between them and the bank, the indorsers. Lewis v. Monahan, 173 Mass. 122, 53 N. E. 150. The fact that the note was declared void as to her did not destroy the original transaction, or avoid the debt created by the loan to her. Walker v. Mayo, 143 Mass. 42, 8 N. E. 873; Sutton v. Toomer, 7 Barn. & C. 416. If the other parties to the note had been co-makers with her, and the loan had been made to all of them, and the note had afterwards been avoided by one of them, there would seem to be no doubt that the payee could have maintained an action against all of them for money had and received, or money lent. Leonard v. Society, 2 Cush. 462. In such a case, the note having been received on the faith that it was the valid note of all, the payee "would be warranted in treating it as a nullity, and resorting to the original contract." Leonard v. Society, supra. A fortiori, ought that to be the case when the liability of the other parties is, as here, collateral, and the action is brought against the maker alone. It is true that the plaintiff could have treated the note as valid as against the other parties, and that, if the plaintiff had sued and recovered against the last indorser, for instance, the husband might have been estopped in an action against him by a subsequent indorser to deny the validity of the note. Roby v. Phelon, 118 Mass. 541. But this action is not against the indorsers, and the counts that we are considering are not upon the note. The only use of the note which the plaintiff can make in relying on those counts is as evidence tending to show the terms on which the loan was made to defendant's intestate. It cannot recover upon the note and the common counts both, and, so far as it relies upon the common counts, it must be taken to rely upon the original contract with the maker of the note, and therefore to have elected to treat the note as a nullity. In such a case the plaintiff would have no ground of recovery against parties whose only liability as between them and the bank is that of indorsers on the note.

The plaintiff contends, however, that it is entitled to be relieved in equity against the defense that the notes are void because made payable by the defendant's intestate to her husband. Its contention is, in substance, that the defendant's intestate, having received and kept the proceeds of the notes, is estopped in equity to deny their validity. But a party cannot be relieved in equity, we think, by reason of an estoppel any more than at law, from the effect of a positive rule of law. * * *

The result is that in the action at law we think the exceptions should be sustained, and that in the bill in equity the decree sustaining the demurrer and dismissing the bill with costs should be affirmed. So ordered.[55]

[55] "We think there was sufficient evidence to sustain the count in the declaration for money had and received. It appeared that the plaintiff bought of a person who had been acting as an agent of the defendant to sell its tickets

KELLEY v. LINDSEY.

(Supreme Judicial Court of Massachusetts, 1856. 7 Gray, 287.)

Action of contract on a check payable to the plaintiff and signed "Benjamin Lindsey, by George C. Coffin." There were also counts for money lent, and for money had and received.

At the trial in the court of common pleas, before Morris, J., the evidence tended to show that Coffin obtained the money of the plaintiff for the use of the defendant, and that it was applied for the benefit of the defendant in his business; that Coffin was, at the time the check was drawn and dated, the financial agent and confidential clerk of the defendant, and had charge of his money affairs, while the defendant was engaged personally as editor of a newspaper. It did not appear that specific authority had been given by the defendant to Coffin to borrow from the plaintiff, but there was considerable evidence going to show an implied authority in Coffin to borrow money for use in defendant's business.

The trial judge charged that it was for the jury to determine, from the whole evidence in the case, whether Coffin had such authority from the defendant. The court further instructed the jury "that if they were not satisfied that Coffin had authority to borrow the money which the plaintiff sought to recover in this action, yet if they were satisfied by the evidence that said money was expended by Coffin in the defendant's business, or in payment of his debts, and that the defendant had the use and benefit of it, the plaintiff was entitled to recover the same upon the count for money had and received, subject to the legal deduction for any forfeiture incurred by the usury."

The jury found a verdict for the plaintiff, and the defendant alleged exceptions.

DEWEY, J.[56] * * * The remaining instruction was objectionable, and should not have been given. If Coffin had no authority to borrow money on account of the defendant, to expend in his business and to pay his debts, the money advanced for that purpose, though so applied, created no debt against the defendant. No one can thus make himself a creditor of another by the unsolicited payment of his debts; and it is not enough to create a liability, that the defendant had the benefit of the money, by reason of its being expended

certain documents purporting to be passage tickets of the defendant. So far as appears, there was nothing in the circumstances when the tickets were bought to notify the plaintiff that the defendant had revoked the agency of the seller, if it had done so, and tickets exactly like those in question had been accepted as valid by the defendant. Having paid his money to the agent of the defendant for valid tickets, he is entitled to recover it from the company, since the company have repudiated the act of their agent and have notified the plaintiff that the tickets are worthless." Simmoneli v. White Star Line (R. I. 1906) 66 Atl. 836.

[56] The statement of facts is rewritten and only that portion of the opinion which discusses the last instruction is printed.

in his business or in the payment of his debts. There must have been shown some authority to make such advance or payment of money, proceeding from the defendant, in addition to the mere fact of its being applied for his benefit, in order to charge him with the same in a suit at law.

For this reason, the court are of opinion that the verdict must be set aside and a new trial had.[57]

FIRST NAT. BANK OF LAS VEGAS v. OBERNE.

(Supreme Court of Illinois, 1886. 121 Ill. 25, 7 N. E. 85.)

Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook county; John G. Rogers, Judge.

SHELDON, J. This was an action brought by the First National Bank of Las Vegas against George Oberne and Henry N. Hosick upon the following guaranty of a promissory note, viz.:

"$1,000. Las Vegas, N. Mexico, October 15, 1882.

"Six months after date I promise to pay to the order of Oberne, Hosick & Co. one thousand dollars, at Las Vegas, New Mexico, at the rate of one per cent. per month from date till paid. Value received.

"Edwin A. Prentice.

"Pay to the First National Bank, Las Vegas, or order.

"For and in consideration of the sum of ten cents, the receipt whereof is hereby acknowledged, we hereby guaranty the payment of the within note, waiving demand and notice of non-payment and protest, and agree to pay all costs and expenses paid or incurred in collecting same. Oberne, Hosick & Co.,

"By Thomas Davis."

The declaration contained also the common counts. The issue formed under the plea of the general issue, verified by affidavit, was tried by the court without a jury, and found for the defendants, and, after overruling a motion for a new trial, judgment was entered accordingly, which was affirmed on appeal to the appellate court for the First district, and the plaintiff appealed to this court.

Oberne, Hosick & Co., the defendants, were a firm in Chicago, dealing in wool, hides, and pelts, etc., who bought them at various

[57] "If Cutting borrowed money of the plaintiff on the credit of Mrs. Post, without her authority, and paid a part of it to Holmes & Ross [creditors of Mrs. Post] without her knowledge, it could give the plaintiff no right of action against her. She could not be made the debtor of the plaintiff without her consent. If Cutting borrowed money in her name, without authority, and she had knowledge of the fact, and that the money went into her business, and she had the benefit of it, she thereby adopts the transaction, and makes it her own." Spooner v. Thompson (1876) 48 Vt. 259.

In Newell v. Hadley (1910) 206 Mass. 335, 343, 92 N. E. 507, 29 L. R. A. (N. S.) 908, Loring, J., suggests that relief might be had in equity in such a case as Kelley v. Lindsey.

places, Las Vegas among others, had them shipped to Chicago, and sold them there. Thomas Davis was their agent at Las Vegas. The course of business was for Davis, when he made a purchase, or anticipated making one, to draw drafts on Oberne, Hosick & Co., the amounts of which were placed to their credit in open account on the books of the bank, and were checked against by Davis, who signed the firm name of Oberne, Hosick & Co. to the checks by Thomas Davis. On October 23, 1882, the account of Oberne, Hosick & Co. was overdrawn $16.45. On that day Davis applied to the bank for it to purchase the note in question. The cashier wrote on the back of the note the indorsement and guaranty which appear, and Davis signed the name of the firm by himself thereunder. The note was then taken by the bank, and the amount of it placed to the credit of Oberne, Hosick & Co. on the books of the bank. This amount, between October 23d and November 20th following, was all checked out by Davis upon checks signed: "Oberne, Hosick & Co. Per Thomas Davis." There were no other credits in the account of Oberne, Hosick & Co. during that period from October 23 to November 20, or until December 1, 1882. Two of the checks thus drawn, one on October 24th, the other on October 26th, for the respective sums of $500 and $60.27, were given to Weil & Graaf for hides and pelts bought of them by Thomas Davis, as agent of Oberne, Hosick & Co. The note of Prentice appears to have been given for a loan of money to him by Davis.

The foregoing facts are undisputed, and upon them we are of opinion there was a right of recovery, at least to the extent of $560.27, the amount of the proceeds of the note which was paid to Weil & Graaf. Admitting that there was no authority in Davis to bind Oberne, Hosick & Co. by the indorsement and guaranty of the note, yet it appears that in consequence of such indorsement and guaranty there was placed to their credit on the books of the bank the proceeds of the note, $1,000, and that $560.27 of such proceeds was actually paid out by the bank to Weil & Graaf upon checks given by the defendants by their agent in payment for hides and pelts bought of Weil & Graaf by the defendants; so that defendants actually got that much of the proceeds for the guaranteed note. Now, they cannot be permitted to repudiate a contract made in their name by an assumed agent, on the ground of a want of authority in the agent to make it, without restoring the money received by them under the contract, and as the result of the agent's act. See Harding v. Parshall, 56 Ill. 219. It was for the consideration of the supposed guaranty by defendants, of the note, that the bank paid over to them the money, and manifestly the bank should have either one or the other, the consideration or the money; and if defendants deny the consideration to the bank, they should repay to it the money they have received.

It is urged by appellant that as Davis was authorized to give checks

upon the bank in the name of Oberne, Hosick & Co., and as the entire proceeds of the note were drawn out on checks thus given, the whole amount should be taken as received by the defendants, or that the bank had the right to consider it as so received. Though the checks were drawn in the name of Oberne, Hosick & Co. by Thomas Davis, they might have been so drawn wrongfully, and the money not have gone to the use of defendants, in the same manner as the transaction of the note was without authority. And it was only funds in the bank, of Oberne, Hosick & Co., that Davis was authorized to check upon, and the proceeds of the note were not their funds if they repudiated the transfer and guaranty of the note. Otherwise than as to the amount shown to have actually gone to the use of defendants in payment for goods purchased by them, viz., $560.27, we cannot say the judgment was wrong.

The judgments of the appellate and circuit courts are reversed, and the cause remanded to the circuit court. Judgment reversed.

MULKEY, C. J. I do not concur in this opinion.[58]

MERCHANTS' NATIONAL BANK OF PEORIA v. NICHOLS & SHEPARD CO.

(Supreme Court of Illinois, 1906. 223 Ill. 41, 79 N. E. 38, 7 L. R. A. [N. S.] 752.)

CARTWRIGHT, J.[59] Appellant brought this suit in the circuit court of Peoria county against appellee, a corporation of Battle Creek, Michigan, engaged in the manufacture and sale of threshing machinery at

[58] In Bannatyne v. MacIver, [1906] 1 K. B. 103, the defendant's agent, in excess of his authority, borrowed money from plaintiff (who was ignorant of the agent's want of authority), and expended it in payment of liabilities of defendant. The court allowed a recovery, Collins, M. R., saying: "Some money has found its way into the coffers of the firm in this sense—that it was credited to their account at the bank, and has been applied on their behalf in payment of their liabilities. Whether or not it could be recovered at common law by the lender it is not necessary to decide, though I should think that it could not; but we have to apply the general law, legal and equitable, and it appears to me that, so far as the money can be shewn to have been applied for the benefit of the defendants, in paying claims for which they were legally liable, it can be recovered upon equitable grounds."

In Reversion Fund & Insurance Co. v. Maison Conway, [1913] 1 K. B. 364, the facts were the same as in Bannatyne v. MacIver except that at the time of making the loan the plaintiff was aware of the agent's lack of authority. The Court of Appeal (reversing the judgment below) by Buckley, L. J., and Kennedy, L. J. (Vaughan Williams, L. J., dissenting), allowed a recovery.

See 59 University of Pennsylvania Law Review, 245.

Certain special rules applicable to unauthorized loans to municipal corporations are discussed in a note in 4 Columbia Law Review, 67. See, also, 17 Harvard Law Review, 343.

For a discussion of the conflicting views as to the effect of ultra vires agreements of private corporations and the quasi contractual rights of recovery for benefits conferred thereunder, see 2 Machen on Corporations, ch. XVI; Richards, Cases on Corporations, 369 to 380.

[59] Portions of the opinion (dealing with matters of agency and estoppel) are omitted.

that place, to recover $1,023.60, the aggregate of 24 checks, which created an overdraft of that amount in appellee's bank account. The declaration was in the common counts with an itemized account showing the amount of each check, and the plea was the general issue. The cause was tried by the court without a jury, and there was a finding and judgment for the appellee, which was affirmed by the Appellate Court for the Second District. From the judgment of the Appellate Court this appeal was prosecuted.

The checks which created the overdraft were signed with the name of the defendant, "by W. H. Harte, Manager," and Harte was defendant's agent at Peoria. At the trial the plaintiff presented to the court propositions to be held as the law, to the effect: First, that the agency was of such a nature that the agent had lawful authority to borrow from the plaintiff the money in question by drawing the checks in the name of the defendant; second, that the defendant was estopped to deny its liability for the amount of the overdraft on account of its failure to perform an alleged duty to the plaintiff to examine its account as shown by the pass book, which had been written up and balanced monthly while the account was running, and to examine the returned checks and to give notice to plaintiff that overdrafts were not authorized; third, that plaintiff was entitled to recover on the ground the defendant had the benefit of the overdraft. The propositions were refused, and inconsistent propositions requested by the defendant were held to be the law.

The facts were not in dispute, and were as follows: The defendant sold its threshing machinery and threshing outfits through 11 agencies, established in various states, for different districts. One of these agencies for Illinois and a part of Missouri was located at Bloomington, and afterward at Peoria. Harte was placed in charge of the agency at Bloomington in 1900, and remained there until January, 1902, when the agency was transferred to Peoria, and Harte then opened a banking account with the plaintiff, with defendant's knowledge, in its name. The account continued until the discharge of Harte, in June, 1904. Harte had entire charge of the agency at Peoria, rented a building for the business, employed assistants, fixed and paid their salaries, had charge of about 15 traveling salesmen and 100 local agents for the sale of machinery, paid the bills for all expenses incurred in the business in his district, and made sales, collections, and settlements therein. He was authorized to collect any money due the defendant in his territory, and he received checks and drafts from customers payable to defendant, which he indorsed in its name and deposited the proceeds in plaintiff's bank. The funds with which he carried on the business were received from sales and settlements or were sent to him by defendant from Battle Creek. Written contracts for sale of threshing outfits were made by him in defendant's name and were to be submitted to the defendant for approval. They were generally so submitted and were always approved, but sometimes sales

were made without submitting them, and no objection was made. He made remittances from time to time to the defendant by checks drawn on its account payable to its order. He kept books showing the sales of machinery and repairs, and notes and collections. He signed the checks the same as the checks in controversy in this case, and each month the bank wrote up the account on the pass book and returned the book, with the canceled checks, to him. He kept it in his office at Peoria, and it was never sent to Battle Creek nor seen by any officer of the defendant. In May, 1902, he overdrew the account, and the pass book, when balanced on June 30th, showed a charge of 30 cents for interest. Overdrafts occurred several times thereafter, and in each case there was a small charge for interest. There was no other indication of an overdraft in the pass book, and it showed balances to defendant's credit from time to time. The overdrafts were all covered by deposits, except the last one, created by the 24 checks, which were paid in July, 1904. During his agency Harte made monthly reports to the defendant showing the cash received and paid out in each month, and these statements always showed a cash balance on hand. The statements were generally false, and Harte had appropriated money of the defendant from time to time so that he did not have the cash balance shown by his statements, either in plaintiff's bank or elsewhere. Plaintiff never gave any notice to the defendant of any overdraft, and the defendant never knew of any. On June 30, 1904, Harte reported in his monthly account a cash balance of $926.72 which had no existence, and he drew on defendant for money to pay current expenses. This led to an investigation, and he reported his shortage to the defendant, the total amount of which, excluding the overdraft, was $2,225.57. The 24 checks were drawn by Harte in the ordinary course of the business, and the proceeds were paid for the expenses of the defendant in the business, except four checks, aggregating $95.52, which Harte received personally.

The payment of the checks when there were no funds of the defendant in the bank constituted a loan of the money paid, and defendant never gave Harte any authority to borrow money on its account by that method or any other. He was supplied by the defendant with the necessary funds to execute the duties imposed upon him, and the only occasion for overdrawing the account was his appropriation of defendant's money. There is no claim that the power was expressly given, but the argument is that the power arose out of the nature of the agency, and that plaintiff had a right to assume that the power existed. * * * There is no ground upon which it can be said that the power existed.

It is next contended that the defendant was estopped to deny its liability to plaintiff by its failure to examine the pass book, canceled checks, and check stubs in the hands of Harte at Peoria.[60] * * *

[60] The court concluded that the defendant was not estopped.

The last proposition of law contended for is that the defendant is liable because the checks which created the overdraft were given in the business of the defendant, with the exception of $95.52, which went to Harte. In the case of First Nat. Bank of Las Vegas v. Oberne, 121 Ill. 25, 7 N. E. 85, the principal was permitted to deny the authority of the agent to execute a guaranty, but only upon restoring the money received as the result of the agent's act; but in this case the defendant was the loser to the amount of Harte's defalcation after crediting the proceeds of the checks. While most of the checks creating the overdraft were given by him for expenses, they were, in fact, to replace money which he had misappropriated. He was short in his account to the amount of $2,225.57, and we do not think that justice required the defendant to add to its loss the amount sued for.

The rulings of the trial court on the propositions submitted to it were in substantial accord with what we have said, and the Appellate Court did not err in affirming the judgment.

The judgment of the Appellate Court is affirmed. Judgment affirmed.

FARMER and VICKERS, JJ., took no part in the decision of this case.[61]

HATHAWAY v. DELAWARE COUNTY.

(Court of Appeals of New York, 1906. 185 N. Y. 368, 78 N. E. 153, 13 L. R. A. [N. S.] 273, 113 Am. St. Rep. 909.)

Appeal from a judgment of the Appellate Division of the Supreme Court in the third judicial department, which reversed so much of a judgment at a Trial Term as directed judgment for the plaintiffs on the plaintiffs' second cause of action and granted a new trial thereon.

CULLEN, C. J.[62] * * * As to the second cause of action we think that the decision of the Trial Term was correct and the action of the Appellate Division in reversing the judgment awarded by the Trial Term was erroneous. The facts on which this claim was founded

[61] "Whether a person, under any circumstances, can be made a debtor for money borrowed by another for him without authority, and appropriated to his use without his knowledge or consent, need not be considered. See Kelley v. Lindsey (1856) 7 Gray (Mass.) 287. No obligation on the part of the defendant ought to be implied in this case because Reed was a defaulter, and the money was used to cover up his defalcation by paying debts of the company which the money of the company, if he had not embezzled it, would have been used to pay. The only reasonable inference is that Reed's primary purpose in using the money in this way was to escape detection, and benefit himself. Whether it was a benefit to the company that he was able to obtain and use money for this purpose is necessarily uncertain. The money was not borrowed bona fide for the use of the company. See Bank v. Lowell (1872) 109 Mass. 214; Bank v. South Hadley (1880) 128 Mass. 503. By the terms of the report, there must be judgment for the defendant." Craft v. South Boston Railroad (1889) 150 Mass. 207, 22 N. E. 920, 5 L. R. A. 641.

But see Reid v. Rigby & Co., [1894] 2 Q. B. 40.

[62] Portions of the opinion are omitted.

are as follows: Prior to January 1, 1900, one Woodruff was the county treasurer of Delaware county—the respondent in this action—and was a defaulter in his trust. On that day he was succeeded as county treasurer by Hugh Adair. About May 1, 1900, Adair discovered that Woodruff was indebted to the county, and demanded payment of the debt. Thereupon Woodruff presented to the plaintiffs what purported to be a note of the county of Delaware and to be executed by Hugh Adair, its treasurer, under authority of the board of supervisors, for the sum of $5,000 and interest, payable February 1, 1901. The signature of Adair to this note was forged by Woodruff. Woodruff had dealt with the plaintiffs during his incumbency of the office of county treasurer, and had borrowed for the county, on what either were or were assumed to be its obligations, several sums of money. On the presentation of the forged note referred to Woodruff represented that he was obtaining the loan for the county. The plaintiffs thereupon drew their check to the "order of Hugh Adair, county treasurer of Delaware County," and delivered it to Woodruff for transmission to the county treasurer. Woodruff turned the check over to Adair on account of his personal indebtedness and it was received by Adair as a payment on that account, he being ignorant of the means by which Woodruff had obtained it. The money was collected and went into the treasury of Delaware county. The plaintiffs on discovering the forgery demanded the return of the money, which, being refused, they instituted this action. * * *

Plaintiffs sought to recover this money as paid under a mistake of fact. The rule as to such payments is thoroughly settled in this state. "Money paid under a mistake of fact may be recovered back, however negligent the party paying may have been in making the mistake, unless the payment has caused such a change in the position of the other party that it would be unjust to require him to refund" (Nat. Bank of Commerce v. Nat. Mechanics' Banking Ass'n, 55 N. Y. 211, 14 Am. Rep. 232) and if circumstances exist which make such recovery inequitable, the burden of proving that fact rests upon the party resisting the payment. (Mayer v. Mayor, etc., of N. Y., 63 N. Y. 455; Phetteplace v. Bucklin, 18 R. I. 297, 27 Atl. 211.) That the plaintiffs paid their money under a mistake of fact, to wit, that they had received a genuine obligation of the defendant, is unquestioned. It does not appear that the defendant's claim against Woodruff or his sureties has been in any manner jeopardized or impaired.

On final analysis the transaction is simply this: The plaintiffs paid money to the defendant as a loan. The defendant received it as a payment on the debt of Woodruff. Though the fault or misfortune which led to this mistake was the plaintiffs', in failing to discover the forgery, that no more than negligence can bar their right to recover, unless by that payment the situation of the defendant has been altered to its detriment. Generally in actions of this kind the mistake under which money is paid is a mutual one as to the existence or nonexistence of

a fact which justifies or requires the payment. It is not essential, however, that the mistake should be of that character.

The case at bar is on all fours with that of Mayer v. Mayor, etc., of N. Y., supra. In that case the plaintiff paid the city of New York an assessment for a local improvement upon an adjoining lot instead of the assessment on his own. The fault or negligence by which the payment was made on the wrong lot was the plaintiff's, yet it was held that he was entitled to recover back the money so paid, it not appearing that by the payment the city had lost its lien upon the lot, the assessment of which had been paid. Judge Andrews said: "The city received the money upon a lawful demand, but from a person who was not legally liable to pay it, and we do not find that the circumstance that money paid by mistake is received upon a valid claim in favor of the recipient against a third person prevents a recovery back, provided the claim against the party who ought to pay it is not thereby extinguished or its collection prevented." The case is decisive of the one before us, unless under the facts some other rule conflicting with or modifying the general rule is applicable to this case.

The learned judge who wrote for the Appellate Division recognized the principle that money paid under a mistake of fact may be recovered back, and would have upheld the judgment for the plaintiffs had he not deemed the case controlled by the decision of this court in Goshen Nat. Bank v. State, 141 N. Y. 379, 36 N. E. 316. That case and the earlier decisions on which it is founded (Justh v. Nat. Bank of Commonwealth, 56 N. Y. 478; Stephens v. Bd. of Education of Brooklyn,[63] 79 N. Y. 183, 35 Am. Rep. 511; Southwick v. First Nat. Bank, 84 N. Y. 420) proceed on the primary proposition that "money has no earmarks" and that the possession of money vests the title in the holder as to third persons dealing with him and receiving it in good faith in the due course of business, and upon the secondary principle that where money is transferred by checks the same rule obtains as where payment is made in coin or bills. In the Justh Case a person had obtained a loan from the plaintiff on altered and forged bonds. The money was advanced by a check to the order of the borrower, who deposited it in the defendant bank. Thereafter by a check on his deposit the forger paid the defendant a loan which he had obtained from it. In the Stephens Case one Gill obtained from the plaintiff money on a forged mortgage and the check was deposited in Gill's bank and collected. Thereafter Gill paid the defendant a debt he owed it by a check on his own bank. It was held that the plaintiffs could not recover, but it is to be observed that in each case the plaintiff intended to give the money to the borrower, that the check was given for the purpose of paying the borrower, and when deposited and collected it was the same as if payment had been made in the first instance in money. The same is true of the checks given by the bor-

[63] This case is printed at page 108, supra.

rowers to their creditors. When the money was collected thereon it was the same as if the original payments had been made in money. There was not in any respect a diversion of the checks. Each served the exact purpose for which it was drawn. The latest case in this court is Nassau Bank v. Nat. Bank of Newburgh, 159 N. Y. 456, 54 N. E. 66, and is of a similar character.

The crucial distinction between those cases and the present one lies here. There was an earmark on the money which the defendant received and the plaintiffs' check was diverted in that, while it was given as a loan to defendant, it was used to pay Woodruff's debt. Had the plaintiffs given Woodruff money and the defendant received it in good faith without knowledge how it was obtained, doubtless the plaintiffs could not recover. I assume that if they had given a check to Woodruff's order the money could not be reclaimed after payment even if plaintiffs could have successfully resisted an action brought on the check. Southwick v. First Nat. Bank, supra, opinion pages 434, 435. But that is not the present case. The check was drawn by the plaintiffs to the order of the defendant. It imported on its face that the money represented by it was the property of the plaintiffs, and that they, not Woodruff, were paying it to the defendant. Sims v. U. S. Trust Co., 103 N. Y. 472, 9 N. E. 605; Bristol Knife Co. v. Nat. Bank of Hartford, 41 Conn. 421, 19 Am. Rep. 517. Woodruff had no apparent title to the check. He was merely the agent of the plaintiffs for the purpose of delivering it to the defendant. * * *

The judgment appealed from, * * * so far as it reversed the judgment for the plaintiffs on the second cause of action, should be reversed and such part of the judgment of the trial court reinstated; neither party to recover costs in the Appellate Division or in this court.

Judgment accordingly.

II. Mistake as to Title to Property Which is the Subject-Matter of a Contract

DORSEY v. JACKMAN.

(Supreme Court of Pennsylvania, 1814. 1 Serg. & R. 42, 7 Am. Dec. 611.)

This was a writ of error to the Common Pleas of Washington County.

It was an action of assumpsit for money had and received, brought by the defendant in error, the plaintiff below, against Dorsey, to recover the amount of the purchase money paid for a tract of land, on the ground that the consideration had failed, the title of the defendant proving to be defective.

It appeared in evidence on the trial, that on the 25th October, 1796, the defendant executed a writing by which he agreed "to sell and convey to William Jackman, lot No. 142, in Nicholson's district depreciation land, containing 308 acres, at two dollars per acre; one-half

now paid, the other half at 12 months. The conveyance to be made as soon as convenient on request."

It was admitted by the defendant that he had received from the plaintiff the whole amount of the purchase money, $608. It appeared in evidence that the tract of land in question had been sold by the commissioners of Allegheny county for non-payment of taxes, and purchased by the defendant for £115. The commissioners' deed was dated 9th August, 1796. When the plaintiff called upon the defendant to pay the last instalment of the purchase money, he told the defendant that he expected an honest good title according to their agreement. The defendant offered him the commissioners' deed with an assignment on the back of it. The plaintiff objected to this as insufficient, and insisted that the defendant should give his own deed to him for the land. The defendant refused to give any other than the assignment. The plaintiff received it, observing that he had great confidence in the defendant, and hoped he would not palm upon him an insufficient deed. The deed of assignment was in the following words:

"I do for the consideration of $608, the receipt of which I do hereby acknowledge, assign unto Mr. William Jackman, his heirs and assigns for ever, the within-mentioned tract of land.

"February 1, 1798. J. Dorsey. [L. S.]"

Attested by two witnesses.

The plaintiff, Jackman, shortly after the agreement of the 25th October, 1796, took possession of the land, and has remained in possession ever since. Suspecting the title to be defective, he took the advice of counsel in the fall of 1803, who informed him that the title was worth nothing; in consequence of which discovery, he made inquiry for the owner of the land, who lived in Philadelphia, and purchased it again from him the same year, at three dollars per acre.

The charge of the Court was in favour of the plaintiff, and the jury gave a verdict accordingly for $1151.92 the amount of the sums paid with interest.

An exception was taken to the charge of the Court, and the whole record was removed into this Court by writ of error.

This cause was argued last term before YEATES and BRACKENRIDGE, Justices, and another argument ordered. It was again argued at this term.

TILGHMAN, C. J.[64] This is an action for money had and received, brought by Jackman, the plaintiff below, against Dorsey, the defendant, who had sold and conveyed to the plaintiff, a tract of land, without warranty of any kind. The plaintiff had paid the purchase money, after which, apprehending the title to be defective, and having made a second purchase from the person in whom he supposed the true

[64] The statement of facts is abridged. The concurring opinion of Yeates, J., and the dissenting opinion of Brackenridge, J., are omitted.

title to be vested, he brought this action to recover the money paid on the bad title. The president of the Court of Common Pleas of Washington county, charged the jury in favour of the plaintiff, whereupon the counsel for the defendant excepted to his opinion, and the cause has been removed to this Court by writ of error.

The opinion of the Court of Common Pleas, was founded upon this principle, that the action for money had and received, is in nature of a bill in equity, and lies in all cases, where the defendant has received money, which he cannot in good conscience retain. The money having been paid in this case for land, to which the defendant had no title, the consideration of the payment has failed, and therefore it is concluded, it ought to be refunded.

But although the title has proved defective, it does not follow, that the money cannot in good conscience be retained, because it may have been the intent of the parties, that the purchaser should run the risk of the title. Between the sale of goods and of lands there is a marked distinction. In the former, the law implies a warranty, but not in the latter. This distinction is of long standing, not founded on an arbitrary rule, but existing in the nature of things. With regard to goods, possession is strong evidence of title, and the only evidence which in most cases the purchaser can obtain. But as to lands, the case is altogether different, because the title depends on writings only. Of these writings, one party is as able to judge as the other; the construction is often doubtful, and in doubtful cases, where the purchaser requires no warranty, it is reasonable that the price should be reduced in proportion to the hazard. When it has been long understood, that no warranty is implied on a sale of lands, it must be supposed that both buyer and seller proceeded on that understanding. Consequently, the purchase money may be retained with good conscience. I take for granted, that the seller has practised no fraud, or deception. If he has, the case is altered, and the purchaser may be relieved on other grounds, than failure of the consideration. That the law has been held as I have mentioned, will appear, not only from the opinion of elementary writers, but from adjudged cases, both at law and in equity, and I know of no adjudged case of good authority to the contrary. In the case of Lord Burkhurst v. Fenner, &c., Executors of Lady Dacres, 1 Rep. 1, it was determined, that if one seized in fee conveys to another in fee, without warranty, and without mention of title papers, yet the papers pass to the feoffee, "because he is to defend the land at his peril; it is therefore reasonable, that he should have the papers as incident to the land, and that the feoffor should not have them, because he can receive no benefit by keeping them, nor sustain damage by delivering them."

Judgment reversed.[65]

[65] "If the plaintiff had paid her money for a mere quitclaim deed, there being no evidence or even allegation of fraud, but merely a mistake of the par-

CRIPPS v. READE.

(Court of King's Bench, 1796. 6 Term R. 606.)

Assumpsit for money had and received to recover a sum of forty guineas, which had been paid by the plaintiff to the defendant for the purchase of a leasehold estate. The defendant claimed the estate in question as administrator to Mary Bartlett, who had taken out letters of administration to her husband, the former possessor of the estate, under the name of Caleb Bartlett, his real name being Carey Bartlett. On the sale the lease itself was delivered to the plaintiff, but there was no assignment or other conveyance from the defendant: but a conversation took place between them in which the latter said "that the premises were his right and property to do as he liked with, and if anything happened he would see the plaintiff righted." Afterwards John the nephew of Carey Bartlett took out administration to him by the right name, and recovered possession of the premises by ejectment.

It was contended on the part of the defendant at the trial, 1st, that no action lay to recover the purchase-money, on the authority of Bree v. Holbech, Dougl. 654 (3d Ed.), where under circumstances of a similar nature the principle of caveat emptor was held to apply. But 2dly,

ties as to the title of Bickford and Willard, it is well settled that the plaintiff could not, upon the failure of title, recover back the consideration paid. The English doctrine on this subject is stated in 2 Kent, Com. (6th Ed.) 468. The learned author says: 'I apprehend that in sales of land the technical rule remits the party back to his covenants in his deed; and if there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money, even on failure of title. This is the strict English rule, both at law and in equity.' * * * And this is the doctrine which ought to prevail. It has not only been so long practiced upon as to be understood, but it is plain and simple, and in conformity with the language of the deed, which does not profess to do more than convey such right, title and interest as the grantor has. And the convenience of business requires that such a class of conveyances shall exist, by which a person may quitclaim his title without being subject to litigation if it fails. With such a doctrine, a grantee can always protect himself against mistakes, by declining to purchase unless the grantor will insert such covenants as may be necessary. It is much better to let the deed, which is the written contract between the parties, settle the question which party took the risk of mistakes as to the validity of the title, than to open the matter to the uncertainty and litigation which the admission of parol evidence would occasion." Earle v. De Witt (1863) 6 Allen (Mass.) 520, 526.

"The general rule is that a purchaser who has accepted a deed can not detain the purchase money, nor recover it back, if already paid, unless there has been a breach of the covenants, either special or statutory, contained in his deed. If there be no covenants, express or implied, of seisin, good right to convey, or freedom against incumbrances, the grantee has no cause of action, nor legal excuse to hold back his payments until he has been evicted. But there is one exception. Fraud taints all that it touches. If there has been concealment of material facts, or misrepresentation affecting the title or situation of the property, amounting to fraud, the fact that the contract has been executed by delivery of the deed does not deprive the purchaser of his right to relief, nor is it material whether the covenants for title do or do not extend to the particular defect. Rawle on Covenants for Title (4th Ed.) p. 565 et seq." Diggs v. Kirby (1883) 40 Ark. 420.

if any action could be maintained, it could only be on the special warranty. But Lawrence, J., before whom the cause was tried at the last Oxford Assizes, overruled the objections, and directed a verdict to be found for the plaintiff, with liberty to the defendant to move to enter a nonsuit.

Plumer now made that motion, upon the grounds mentioned at the trial.

Lord Kenyon, Ch. J. I do not wish to disturb the rule of caveat emptor adopted in Bree v. Holbech, and in other cases where a regular conveyance was made, to which other covenants were not to be added; for in general the seller only covenants for his own acts and for those of his ancestor, in which respect the case of a mortgage differs from it, as a mortgagor covenants that at all events he has a good title: but here the whole passed by parol, and it proceeded on a misapprehension by both parties that the defendant was the legal representative of the lessee, though it turned out afterwards that he was not. As therefore the money was paid under a mistake, I think that an action for money had and received will lie to recover it back; in the case cited no action at all could have been maintained.

Rule refused.

NORTON v. MARDEN.

(Supreme Judicial Court of Maine, 1838. 15 Me. 45, 32 Am. Dec. 132.)

Assumpsit for money had and received, brought to recover back the consideration money paid by the plaintiff to the defendant for the assignment of a bond of a lot of land in Bangor. The defendant held by assignment a bond for the conveyance of a lot, described in the bond, on payment of a specified sum. Prior to the bargain between these parties, there being no evidence that the defendant knew where the lot was, they went together and inquired and entered upon land supposed by them to be the same described in the bond, and thereupon the defendant assigned over the bond, and received the price agreed on. The plaintiff soon afterwards discovered, that the lot described in the bond was a different one from that seen by the parties, and much inferior to it, and gave notice thereof to the defendant, offered back the bond, and demanded the money paid by him.

The trial was before Shepley J., who instructed the jury, that if they were satisfied from the testimony, that the defendant showed to the plaintiff a different lot from that described in the bond, before the contract was made between them; and that it was made upon that erroneous information; and that from the description in the bond he was not undeceived; they would find for the plaintiff, whether such erroneous information was given by the defendant fraudulently, or

through mistake, or want of information on the part of the defendant; and if not thus satisfied, that they should find for the defendant. The verdict was for the plaintiff, and the defendant excepted.

The action was continued nisi, and the opinion of the Court afterwards delivered by

SHEPLEY, J. This is assumpsit for money had and received, brought to recover back a sum of money alleged to have been paid under a mistake. And the question presented by this bill of exceptions is, whether where parties contract under a mutual mistake of the facts supposed to exist, there being no fraud, and no beneficial interest obtained, the one who pays can recover back the money paid.

Certain principles in relation to this action seem now to be well settled. Money paid under a mistake of the law cannot be reclaimed. Doug. 471; Bilbie v. Lumley, 2 East, 469; Stevens v. Lynch, 12 East, 38; Brisbane v. Dacres, 5 Taunt. 144; Mowatt v. Wright, 1 Wend. (N. Y.) 355, 19 Am. Dec. 508. But a mistake of a foreign law is regarded as a mistake of a fact. Haven v. Foster, 9 Pick. (Mass.) 112, 19 Am. Dec. 353. Nor can it be reclaimed, when voluntarily paid with a knowledge, or means of knowledge in hand of the facts. Martin v. Morgan, 1 Brod. & Bing. 289; Welsh v. Carter, 1 Wend. (N. Y.) 185, 19 Am. Dec. 473. Nor where there may be a mistake of the facts, if the party paying has derived a substantial benefit from such payment; because he is not then entitled ex æquo et bono to reclaim it. Taylor v. Hare, 4 B. & P. 262. But when paid under a mistake of facts, and without any laches on the part of the payer, and without any substantial benefit derived from it, it may be recovered back. Hern v. Nicholls, 1 Salk. 289; Cox v. Prentice, 3 M. & S. 344; Milnes v. Duncan, 6 B. & C. 671; Garland v. Salem Bank, 9 Mass. 408, 6 Am. Dec. 86.

In Mowatt v. Wright it is said, that an error of fact takes place, either when some fact which really exists is unknown, or some fact is supposed to exist, which really does not exist. And that, "the cases founded on mistake seem to rest on this principle, that if parties, believing that a certain state of things exist, come to an agreement with such belief for a basis, on discovering their mutual error, they are remitted to their original rights."

In Cox v. Prentice, Lord Ellenborough says, "Now this is a case of mutual innocence and equal error, which is not an unusual case for money had and received."

In the case now under consideration the instructions required, that the jury should find, that there was a mistake of fact, viz.: that the plaintiff supposed, that he was purchasing a bond for a different lot from the one described in it; and that they should also find, that the contract was made upon that mistake of facts. But it is insisted, that the plaintiff had the means of correct knowledge. And in one sense a person may be said always to have the means of knowledge. He may

have access to books, and to the assistance and instructions of his fellow men. But the means of knowledge which the law requires are such, as the party may avail himself of as then present without calling to his aid other assistance. And in this case there is no ground for inferring, that the plaintiff had then the means of knowing that the true lot designated in the bond was not the one examined. He does not appear to have had any more satisfactory means of knowledge, than the statements of the defendant, and those proved to be erroneous.

It is also insisted, that the case is within the principle of the decisions of this Court, that the party, who takes a deed of release of real estate, if he obtain thereby no title, cannot recover back the money paid. Both parties in such cases, must be supposed to understand the tract of land purporting to be conveyed. And the absence of all covenants of title is satisfactory evidence, that they knew that the title was doubtful, and that the contract was made upon that basis. If in such cases there is any mistake, it is rather a mistake of law, than of fact. But the substance of the contract is, that the party purchasing agrees to purchase the other's right, whatever it may be, and take the risk of the title upon himself. And in such cases, there is no principle of law, which authorizes him to reclaim the purchase money in case of an entire failure of title. This is not the case of a conveyance of real estate, but the assignment of a contract for a conveyance, and the contract of assignment made upon a mistake of facts. And there is no evidence, that the plaintiff obtained any benefit from it.

Exceptions overruled, and judgment on the verdict.[66]

[66] "It is undoubtedly the well-established rule of law that so long as a contract for the sale of land is executory only, the purchaser is entitled to have a good title, unless the contrary is expressly or impliedly agreed; but when the bargain is consummated by the delivery and acceptance of a deed, the purchaser must look to the covenants he has taken care to have provided, and in the absence of fraud has no right to relief, either at law or in equity for defects of title, except as such covenants afford it. Rawle, Cov. Tit. 606; Cro. Jac. 196; (1705) 1 Salk. 211; (1787) 1 Term R. 762; (1806) 13 Ves. 121; (1781) Doug. 665; Frost v. Raymond (1805) 2 Caines (N. Y.) 188, 2 Am. Dec. 228, note; Com. v. McClanachan's Ex'rs (1826) 4 Rand. (Va.) 482. * * * This case, therefore, in my opinion does not come within the rule that a purchaser who takes a conveyance of real estate, must take care to protect himself against a failure of title by appropriate covenants or take the risk on himself, for the reason that no conveyance was made or intended to be made in which covenants could be inserted. The rule is technical and does not apply if a conveyance is not in fact perfected. In that event the purchaser can recover back his money if the title fails, even where he has taken possession of the property. Cripps v. Reade (1796) 6 Term R. 606; Johnson v. Johnson (1802) 3 Bos. & Pul. 166; Williams v. Reed (1827) 5 Pick. (Mass.) 480." Phillips v. City of Hudson (1864) 31 N. J. Law, 143, 150.

In Earle v. Bickford (1863) 6 Allen (Mass.) 549, 83 Am. Dec. 651, the defendant, assuming to act as assignee for one Stone, an insolvent debtor, sold and conveyed to plaintiff by quitclaim deed certain land belonging to Stone; but for want of jurisdiction of the court which appointed defendant as assignee of Stone the sale was void. The court allowed plaintiff to recover the

EICHOLZ v. BANNISTER.

(Court of Common Pleas, 1864. 17 C. B. [N. S.] 707.)

This was an action brought in the court of record for the trial of civil actions within the city of Manchester, and which was tried before the Deputy Recorder of that city.

The declaration contained the common indebitatus counts, for money received for the use of the plaintiff, and for money paid; and the only plea was, never indebted.

The plaintiff claimed £19., as money received to his use by the defendant under the following circumstances: The defendant is a job-warehouseman, at Chorlton Street, Manchester, and on the 18th of April, 1864, the plaintiff went to the defendant's warehouse and bought of him certain pieces of print, which the defendant represented as a job-lot just received by him. The price, £19., was thereupon paid by the plaintiff, and the goods were afterwards duly delivered.

The goods so bought by the plaintiff had, in fact, been stolen from the warehouse of John Krauss, by one Richard Aspinwall, who was subsequently convicted of the offence; and the plaintiff, being ultimately obliged to restore the goods to Krauss, required the defendant to return the money he had paid for them. The defendant refused to comply with such request, and therefore, the present action was brought.

The learned judge directed a verdict to be entered for the plaintiff for the amount claimed, reserving leave to the defendant to move to set aside the verdict and enter a nonsuit or a verdict for the defendant, if the court should be of opinion that the plaintiff was not entitled to recover. A rule nisi was allowed.

ERLE, C. J.[67] I am of opinion that this rule should be discharged. The plaintiff brings his action to recover back money which he paid for goods bought by him in the shop of the defendant, which were afterwards lawfully claimed from him by a third person, the true owner, from whom they had been stolen. The plaintiff now claims to re-

money he had paid, saying, "If the title fails for want of authority in the person who makes the deed to act in the capacity in which he proposes to act, the consideration may be recovered back."

It has also been held that one who purchases land at an execution sale where the judgment on which the execution issued was void, and consequently the sale itself void, may recover from the judgment creditor the purchase money paid at the sale. Henderson v. Overton (1830) 2 Yerg. (10 Tenn.) 394, 24 Am. Dec. 492 (an equity case); Schwinger v. Hickok (1873) 53 N. Y. 280; Hoxter v. Poppleton (1881) 9 Or. 482. (In this and the preceding case the judgment creditor seems to have been aware of the invalidity of his judgment, making his receipt of the money fraudulent.)

[67] The statement of facts, excepting the last paragraph thereof, is, with slight modifications, taken from the report of the case found in 34 Law Journal Common Pleas, 105. The concurring opinions of Byles and Keating, JJ., are omitted.

cover back the money as having been paid by him upon a consideration which has failed. The jury at the trial found a verdict for the plaintiff, under the direction of the learned judge who presided, and a rule has been obtained on behalf of the defendant to set aside that verdict and to enter a nonsuit, on the ground that it is part of the common law of England that the vendor of goods by the mere contract of sale does not warrant his title to the goods he sells, that the buyer takes them at his peril, and that the rule caveat emptor applies. The case has been remarkably well argued on both sides; and the court are much indebted to the learned counsel for the able assistance they have rendered to them. The result I have arrived at is, that the plaintiff is entitled to retain his verdict. I consider it to be clear upon the ancient authorities that, if the vendor of a chattel by word or conduct gives the purchaser to understand that he is the owner, that tacit representation forms part of the contract, and that, if he is not the owner, his contract is broken. So is the law laid down in the very elaborate judgment of Parke, B., in Morley v. Attenborough, 3 Exch. 500, 513, where that learned judge puts the case upon which I ground my judgment. A difference is taken in some of the cases between a warranty and a condition [see Bannerman v. White, 10 C. B. (N. S.) 844]; but that is foreign to the present inquiry. In Morley v. Attenborough, 3 Exch. 513, Parke, B., says: "We do not suppose that there would be any doubt, if the articles are bought in a shop professedly carried on for the sale of goods, that the shop-keeper must be considered as warranting that those who purchase will have a good title to keep the goods purchased. In such a case the vendor sells 'as his own,' and that is what is equivalent to a warranty of title."

No doubt, if a shopkeeper in words or by his conduct affirms at the time of the sale that he is the owner of the goods, such affirmation becomes part of the contract, and, if it turns out that he is not the owner, so that the goods are lost to the buyer, the price which he has received may be recovered back. I ventured to throw out some remarks in the course of the argument upon the doctrine relied on by Mr. Holker, which he answered by assertion after assertion coming no doubt from judges of great authority in the law, to the effect that upon a sale of goods there is no implied warranty of title. The passage cited from Noy [68] certainly puts the proposition in a manner that must shock the understanding of any ordinary person. But I take the principle intended to be illustrated to be this,—I am in possession of a horse or other chattel: I neither affirm or deny that I am the owner:

[68] Noy's Maxims, c. 42, p. 89: "If I take the horse of another man and sell him, and the owner take him again, I may have an action of debt for the money; for, the bargain was perfect by the delivery of the horse; and caveat emptor."

if you choose to take it as it is, without more, caveat emptor: you have no remedy, though it should turn out that I have no title. Where that is the whole of the transaction, it may be that there is no warranty of title. Such seems to have been the principle on which Morley v. Attenborough was decided. The pawnbroker, when he sells an unredeemed pledge, virtually says,—I have under the provisions of the statute (39 & 40 G. III, c. 99, § 17) a right to sell. If you choose to buy the article, it is at your own peril. So, in the case of the sale by the sheriff of goods seized under a fi. fa.,—Chapman v. Speller, 14 Q. B. 621.

The fact of the sale taking place under such circumstances is notice to buyers that the sheriff has no knowledge of the title to the goods; and the buyers consequently buy at their own peril. Many contracts of sale tacitly express the same sort of disclaimer of warranty. In this sense it is that I understand the decision of this court in Hall v. Conder, 2 C. B. (N. S.) 22. There, the plaintiff merely professed to sell the patent-right such as he had it, and the court held that the contract might still be enforced, though the patent was ultimately defeated on the ground of want of novelty. The thing which was the subject of the contract there was not matter, it was rather in the nature of mind. These are some of the cases where the conduct of the seller expresses at the time of the contract that he merely contracts to sell such a title as he himself has in the thing. But, in almost all the transactions of sale in common life, the seller by the very act of selling holds out to the buyer that he is the owner of the article he offers for sale. The sale of a chattel is the strongest act of dominion that is incidental to ownership. A purchaser under ordinary circumstances would naturally be led to the conclusion that, by offering an article for sale, the seller affirms that he has title to sell, and that the buyer may enjoy that for which he parts with his money. Such a case falls within the doctrine stated by Blackstone, and is so recognized by Littledale, J., in Early v. Garrett, 9 B. & C. 928, 4 M. & R. 687, and by Parke, B., in Morley v. Attenborough, 3 Exch. 513. I think justice and sound sense require us to limit the doctrine so often repeated, that there is no implied warranty of title on the sale of a chattel.

I cannot but take notice that, after all the research of two very learned counsel, the only semblance of authority for this doctrine from the time of Noy and Lord Coke consists of mere dicta. These dicta, it is true, appear to have been adopted by several learned judges, amongst others by my excellent Brother Williams, whose words are almost obligatory on me: but I cannot find a single instance in which it has been more than a repetition of barren sounds, never resulting in the fruit of a judgment. This very much tends to shew the wisdom of Lord Campbell's remark in Sims v. Marryat, 17 Q. B. 291, that the rule is beset with so many exceptions that they well nigh eat it up. It

is to be hoped that the notion which has so long prevailed will now pass away, and that no further impediment will be placed in the way of a buyer recovering back money which he has parted with upon a consideration which has failed.

Rule discharged.[69]

SMART v. GALE.

(Supreme Court of New Hampshire, 1882. 62 N. H. 62.)

Assumpsit, for money had and received. Facts found by a referee. September 3, 1879, the plaintiff purchased of the defendant the stock of goods, furniture, fixtures, and good-will of a fruit store in Concord, for the sum of $3,200, with an agreement that neither the defendant, nor his son who had been a clerk in the store, should engage in the same business in Concord for ten years, agreeing to pay therefor by conveying to the defendant a house valued at $2,400, and giving notes for $600 and $200, secured by mortgage on all the property in the store except the stock. The defendant, by a bill of sale under seal, conveyed to the plaintiff all the stock in trade, furniture, fixtures, including shelving and counters, and all other personal property in the store and store cellar. The bill of sale also contained the following: "And I hereby covenant with the said grantee that I am the lawful owner of the said goods and chattels, that they are free from all incumbrances, and that I have good right to sell the same as aforesaid, and that I will warrant and defend the same against the lawful claims and demands of all persons." He also gave to the plaintiff a bond in accordance with his agreement not to engage in business for ten years. The plaintiff conveyed the house to the defendant, and gave him a note for $600, and a note for $200, secured by mortgage, as had been agreed. No price was fixed for any portion of the defendant's property separate from the rest. The plaintiff immediately entered into possession of the store and other property purchased. He did not rescind or attempt to rescind the contract. He did not reconvey or offer the property, or any part of it, back to the defendant. In December, 1879, he was informed that the owner of the store owned the fixtures, and thereupon he commenced this action, December 17, 1879. He continued to occupy the store till about June 1, 1880, when he abandoned it, and surrendered the key to the agent of the owner, leav-

[69] For a discussion of the general question of implied warranty upon the sale of a chattel see Williston on Sales, §§ 216–222.

IMPLIED WARRANTY ON SALE OF A CHOSE IN ACTION.—"The doctrine of implied warranty of title applies not simply to chattels but also to choses in action, both to those having tangible form, such as bonds, stock, negotiable paper, and also to those having no tangible form, such as accounts, rights in a partnership, and rights in inventions whether patented or not; in short the doctrine is applicable to all personal property." Williston on Sales, § 218. See, also, Costigan v. Hawkins (1867) 22 Wis. 74, 94 Am. Dec. 583.

ing therein all the property purchased of the defendant except the stock of goods.

CLARK, J. The plaintiff seeks to recover the value of the fixtures on the ground of a failure of consideration. This is not a case of a payment made upon a legal consideration which has wholly failed, and may therefore be recovered back. Leach v. Tilton, 40 N. H. 473, 475. There was no separate valuation of the fixtures and no offer to return them. Weeks v. Robie, 42 N. H. 316. The contract was entire, and has never been rescinded, and the action cannot be maintained. Way v. Cutting, 17 N. H. 450; Miner v. Bradley, 22 Pick. (Mass.) 457; Clark v. Baker, 5 Metc. (Mass.) 452; Bassett v. Percival, 5 Allen (Mass.) 345.

Judgment for the defendant.

III. MISTAKE AS TO EXISTENCE OF SUBJECT-MATTER OF A CONTRACT

STRICKLAND v. TURNER.

(Court of Exchequer, 1852. 7 Exch. 208.)

Assumpsit for money had and received by the defendant, as executrix of Edward Henry Lane, deceased.—Plea, non assumpsit, and issue thereon.

By mutual consent, and by a Judge's order, a case was stated for the opinion of this Court.

POLLOCK, C. B.[70] The question in this case, which the Court took time to consider, lies in a very narrow compass. The plaintiff brought his action against the defendant to recover back money paid by him for the purchase of an annuity bequeathed to Edward Henry Lane, of Sydney, New South Wales, by the will of Mrs. Elizabeth Way. That annuity had been assigned by Edward Henry Lane, who was still residing in Sydney, to Arthur Daintrey and Adrian Daintrey, in order that they, as his trustees, might dispose of it in England for his benefit. They accordingly entered into a negotiation with the plaintiff, who was the residuary legatee under Mrs. Way's will, for the purchase of this annuity. The question between the parties is this—whether the purchase took effect during the existence of the annuity. If it did, though but for an instant, the plaintiff is not entitled to succeed; for he purchased the annuity, and cannot complain that in so doing he has made a bad bargain, as the events have turned out. But if, on the contrary, the annuity had ceased to exist before his purchase, then he has got nothing for his purchase-money, and is entitled to recover it back from the defendant, the executrix of Lane, who has received it from the trustees.

[70] The statement of facts is omitted.

The question, therefore, is, what was the bargain, and when did it take effect? If the annuity was sold upon the 5th of February, 1849, by the acceptance contained in the letter of that date, the subsequent death of the annuitant at Sydney on the 6th of February, 1849, will defeat the plaintiff's claim. If, on the other hand, the agreement was for a future sale, to be effected by assignment of the annuity, which took place on the 28th of February, the previous death of the annuitant will entitle the plaintiff to recover.

We must, therefore, examine carefully the different letters and documents, to see which of these two views of the case we ought to adopt as the fair result of the whole correspondence. There is no doubt that if the purchase had been completed, that is to say, if there had been an agreement that from and after the 5th of February, 1849, the annuity was to belong to Mr. Strickland, and the money given for it to belong to the trustees, the subsequent death of Lane would make no difference. Even a bill for a specific performance could have been maintained upon such an agreement, according to the case of Kenney v. Wexham, 6 Madd. 357. There, there was an agreement dated 18th April, 1818, for the future purchase of an annuity by the payment of two instalments, the first in October, 1818, and the last in January, 1819. The death was subsequent to the last stipulated payment. And the Vice-Chancellor held, that from that date the purchaser became entitled to it, and that the subsequent death of the annuitant in October, 1820, did not prevent the purchaser from having a specific performance; and for this, Mortimer v. Capper, 1 Bro. C. C. 156, Jackson v. Lever, 3 Bro. C. C. 604, Coles v. Trecothick, 9 Ves. 234, were cited.

But here, in the correspondence, we find no such arrangement till the assignment of the 28th of February. The offer which is stated by Mr. Strickland's agent, Mr. Cookney, in the letter of 31st January, 1849, is for the purchase of the annuity "to be completed next April, after the current half-year's annuity is paid, and the legacy duty then payable satisfied, and the future legacy duty allowed for;" and he adds, that his client will be prepared to do this on the 30th of April, unless they can agree for an earlier day of payment, and, so to speak, to discount the payment of the 30th of April on that earlier day.

It is a clear stipulation throughout the correspondence, that the annuity shall continue to be paid up to that day, whatever that might be; and until that day was fixed it is impossible to ascertain what sum of money was to be paid and received. Now this was never ascertained or settled in the lifetime of the annuitant. The annuity, therefore, still continued to belong to Lane, and never, as the Vice-Chancellor says in Kenney v. Wexham, passed to the purchaser, till this was ascertained and the bargain finally arranged between them. When this was done, the annuity became the property of Strickland, and the money the property of the vendors. But then, there was no annuity in existence. The money, therefore, which was paid, was paid wholly

without consideration, and may now be recovered back from the defendant, to whom, as the executrix of Lane, it has passed. We think, therefore, that the judgment should be for the plaintiff.

Judgment for the plaintiff.[71]

[71] In Hitchcock v. Giddings (1817) 4 Price, 135, plaintiff had bought from defendant a remainder expectant on a fee tail and gave his bond for payment. Plaintiff by bill in equity sought to be relieved from his bond on the ground that the tenant in tail had before plaintiff's purchase, unknown to plaintiff and defendant, suffered a common recovery, thereby cutting off the remainder. Richards, C. B., held for plaintiff on the ground that at the time of the sale defendant had nothing to sell, and therefore it was a fraud in equity for defendant to keep plaintiff's money.

In Allen v. Hammond (1837) 11 Pet. 63, 9 L. Ed. 633, a vessel belonging to Hammond was unlawfully captured by a Portuguese warship and, with her cargo, condemned. Upon the remonstrances of the government of the United States the claim of the owner for compensation for this capture was on the 19th of January, 1832, admitted by the Portuguese government to an amount exceeding $33,000; one-fourth of which was soon after paid. On the 27th of January Hammond made an agreement under seal with Allen (neither of them knowing of the admission of the claim by Portugal) to allow him a sum a little below one-third of the whole amount claimed as commissions, on his agreeing to use his utmost efforts for the recovery of such claim from the Portuguese government. Hammond filed a bill in equity for the cancellation of this agreement. The court granted his prayer, McLean, J., who spoke for the court, saying in part: "That the contract was entered into by both parties under a mistake, is unquestionable. Neither of them knew that the Portuguese government had allowed the claim. Can a court of equity enforce such a contract? Can it refuse to cancel it? That the agreement was without consideration is clear. Services long and arduous were contemplated as probable, by both parties, at the time the contract was executed. But the object of pursuit was already attained. No services were required under the contract, and for those which Allen had rendered to Hammond prior to it regular charges seem to have been made. It is true the amount of services required by the agent, was uncertain. He took upon himself this contingency; and had not the claim been allowed by the Portuguese government, until after the contract, he would have been entitled to his commissions, however small his agency might have been, in producing the result. This, it may be supposed, was a contingency within the contemplation of the parties at the time of the contract; so that, unconnected with other circumstances, the smallness of the service rendered could have constituted no ground on which to set aside the contract. But no one can for a moment believe that Hammond intended to give to his agent nearly ten thousand dollars, on the contingency of his claim having been allowed at the time of the contract. And it is equally clear, that his agent under such a circumstance, had no expectation of receiving that, or any other amount of compensation. The contract does not provide for such a case; and it could not have been within the contemplation of either party. Services were made the basis of the compensation agreed to be paid; but the allowance of the claim superseded all services in the case. The equity of the complainant is so obvious, that it is difficult to make it more clear by illustration. No case, perhaps, has occurred, or can be supposed where the principle on which courts of equity give relief, is more strongly presented than in this case. The contract was entered into through the mistake of both parties; it imposes great hardship and injustice on the appellee, and it is without consideration. These grounds, either of which in ordinary cases, is held sufficient for relief in equity, unite in favour of the appellee. Suppose a life estate in land be sold, and at the time of the sale, the estate has terminated by the death of the person in whom the right vested; would not a court of equity relieve the purchaser? If the vendor knew of the death, relief would be given on the ground of fraud; if he did not know it, on the ground of mistake. In either case, would it not be gross injustice to enforce the payment of the consideration? If a horse be sold which is dead, though believed to be living by both parties, can the purchaser be compelled to pay the consideration?

YOUNG v. COLE.

(Court of Common Pleas, 1837. 3 Bing. N. C. 724.)

Action for money paid by the plaintiff to the use of the defendant, and for money had and received by the defendant to the use of the plaintiff.

The plaintiff, a stock-broker, was employed by the defendant in April, 1836, to sell for him four Guatemala bonds, of £254. each. The plaintiff, in three or four days, sold them to Briant for £300., and deducting £1. 5s. for his commission, paid the defendant £298. 15s. Briant, who was conversant with the usages of the Stock Exchange, kept the bonds two days, and then sold them again.

The bonds in question were not stamped. But, in 1829 the Guatemala government had issued an order, which was advertised in the London newspapers, requiring the holders of such bonds to produce them, and have them stamped by an agent of that government within a certain time; in default of which they would not be recognised by the state. Evidence of the advertisement was offered and rejected: but it was proved that since that time, unstamped Guatemala bonds were not a marketable commodity on the Stock Exchange.

Upon that ground, Briant's vendee soon returned the bonds in question. Briant, representing the matter to the plaintiff, the plaintiff, without communicating with the defendant, or returning the bonds, refunded what Briant had paid him, and now sought to recover the amount which he had himself paid over to the defendant.

The defendant upon being applied to, wrote to say that he was agent only as to a part of the bonds; but that if the payment had been made for his own part, he would desire his clerk to reimburse the plaintiff. At the trial he did not shew that all the bonds were not his.

The plaintiff could find no one in this country who had authority now to stamp the bond; but one witness said he had procured a stamp to bonds of the same description.

Both parties, at the time of the transaction, were ignorant that a stamp was necessary. It was proved that brokers on the Stock Exchange do business as principals, in dealing with foreign stock, and

These are cases in which the parties enter into the contract, under a material mistake as to the subject-matter of it. In the first case the vendor intended to sell, and the vendee to purchase a subsisting title, but which in fact did not exist; and in the second, a horse was believed to be living but which was in fact dead. If in either of these cases, the payment of the purchase money should be required, it would be a payment without the shadow of consideration; and no court of equity is believed ever to have sanctioned such a principle. And so in the case under consideration; if Hammond should be held liable to pay the demand of the appellant, it would be without consideration."

See also Woodward v. Cowing (1816) 13 Mass. 216; Raney v. Boyd (1865) 39 Ill. 24.

are liable to be expelled if they do not make good their differences. The defendant's name was not mentioned by the plaintiff to Briant.

On behalf of the defendant, it was objected at the trial before Tindal, C. J., that under these circumstances the plaintiff could not recover on the declaration for money paid or money had and received; but should have declared specially on the implied warranty by the defendant that the bonds he offered for sale were marketable bonds. Whereupon, a verdict was taken for the plaintiff for the amount the defendant had received from him; with leave for the defendant to move to set the verdict aside and enter a nonsuit instead.

A rule nisi was allowed.

TINDAL, C. J. It appears to me, that the sum for which the verdict has been given, is properly called money received by the defendant to the use of the plaintiff. The money which the plaintiff delivered to the defendant was his own money, for he had sold the bonds as a principal to Briant, and was subject to all the responsibilities of a principal. He delivered the money to the defendant on an understanding that the bonds he had received from the defendant were real Guatemala bonds, such as were salable on the Stock Exchange. It seems, therefore, that the consideration on which the plaintiff paid his money has failed as completely as if the defendant had contracted to sell foreign gold coin and had handed over counters instead. It is not a question of warranty; but whether the defendant has not delivered something which, though resembling the article contracted to be sold, is of no value.

The remaining question is, whether the plaintiff had a right to rescind the contract he had entered into with Briant. It is to be observed that in that contract the defendant's name was never used; there was no contract between him and Briant; the plaintiff was the only person known to Briant. But stopping short of that, the universal custom of the Stock Exchange would authorize the plaintiff to rescind the contract without consulting the defendant; and the defendant has been in no respect damaged by what the plaintiff has done.

There is, however, another ground on which the verdict stands clear of objection; that is, that after the defendant was aware of all that had been done, he wrote to say that if the bonds were his own, he would send his clerk to pay the plaintiff the amount. Having omitted at the trial to shew that he held them in the capacity of agent, as he had asserted, his letter is a ratification of what the plaintiff had done, and the verdict ought not to be disturbed.

PARK, J., concurred.

BOSANQUET, J.[72] I agree in the principle of the cases which have been cited as to breach of warranty, but this is not a case of that description. Here, no consideration has been given for the money re-

[72] A portion of the opinion of Bosanquet, J., and the concurring opinion of Coltman, J., are omitted.

ceived by the defendant: the bonds he delivered to the plaintiff were not Guatemala bonds, but, on the Stock Exchange, worthless paper; and the payment made by the plaintiff to Briant was not voluntary. * * *

Rule discharged.

WATSON v. CRESAP.

(Court of Appeals of Kentucky, 1841. 1 B. Mon. 195, 36 Am. Dec. 572.)

EWING, J.[73] This is an action of assumpsit, brought by the appellees against the appellants, for the consideration paid for a hundred dollar bank bill, on the Bank of the United States, passed by the appellants to the appellees, and which is alleged to be a counterfeit. The suit was brought in a short time after the bill was passed to the appellees, and the counterfeit note is exhibited in the record.

The declaration contains three counts, the first a special count, which alleges that the defendants were indebted to the plaintiffs two hundred dollars, and paid them in part, in a hundred dollar bill on the United States Bank, which they assumed to be genuine, when the same was counterfeit and worthless.

The second and third are counts in indebitatus assumpsit; the second, for property and bank bills sold and delivered; the third, for money had and received for the use of the plaintiffs.

We think the declaration is substantially good, and the proof was competent, and justified the verdict of the jury.

It must be presumed that he who passes a bill as money, passes it as genuine, and the law implies an assumpsit or warranty that it is so. Markle v. Hatfield, 2 Johns. 458, 3 Am. Dec. 446; Herrick v. Whitney, 15 Johns. 241.

And if the bill should be counterfeit and worthless, this implied promise is immediately, upon passing the bill, broken, and an action lies for its breach; nor does it matter whether he who passes it knows that it is counterfeit or not. 2 Johns. 458, 3 Am. Dec. 446, supra. The action is not an action for a fraud, but for the breach of promise implied by law. And to sustain this form of declaring, it would certainly be unnecessary to prove that the note was tendered back, as it goes for a breach of promise, and not for a restitution of the consideration upon a disaffirmance of the contract of payment.

As the first count, in the case under consideration, is a count on the implied promise, the proof justified the recovery without any evidence that the bill was tendered back to the defendants before suit brought, and the motion to instruct the jury, as in case of a non-suit, was properly overruled.

We are also satisfied, that if money or other bills, which pass and are received as money, be the consideration given for a counterfeit

[73] A portion of the opinion is omitted.

bill, that it may be recovered back on an indebitatus count, for so much money had and received. Payment for such a bill must be regarded as a payment by mistake for a thing of no value, but which was, at the time it was received, believed to be, and imported on its face to be of intrinsic worth. 2 Johns. 458, 3 Am. Dec. 446.

But this form of declaring proceeds on the ground of a disaffirmance of the contract and a restitution of the thing given in exchange. It is an equitable remedy, and to entitle the plaintiff to recover, if any thing of value has been received, it must be shown that it was tendered back before the action was brought.

A counterfeit bill is certainly of no intrinsic value, it would be as worthless in the hands of the defendants as in that of the plaintiffs, and according to the rule laid down, it would seem unnecessary to show that it was tendered back, even in this form of declaring. But whether it was or not, it is not now necessary to determine, as the recovery was proper on the first count. * * *

The judgment of the Circuit Court is affirmed with costs.[74]

OTIS v. CULLUM.*

(Supreme Court of the United States, 1875. 92 U. S. 447, 23 L. Ed. 496.)

Error to the Circuit Court of the United States for the District of Kansas.

Mr. Justice SWAYNE delivered the opinion of the court.

This case presents but a single point for consideration. In the court below, the defendant demurred to the plaintiffs' petition. The court sustained the demurrer. The plaintiffs elected to stand by it. The court thereupon gave judgment for the defendant.

It is not alleged that there was any fraud on the part of the bank or its agent in selling the bonds in question: on the contrary, their good faith is expressly admitted. The plaintiffs' declaration, or petition as it is called, is not framed upon the theory of bad faith, and a recovery is not sought upon that ground.

The representations made by the agent of the bank to the plaintiffs when they bought the bonds are largely set out; but while it is alleged

[74] In Meyer v. Richards (1895) 163 U. S. 385, 16 Sup. Ct. 1148, 41 L. Ed. 199, the defendant sold to the plaintiff thirteen bonds of the state of Louisiana, delivered them to him, and received from him payment for them in full. Both parties contemplated the purchase and delivery of valid and lawful obligations of the state, and both regarded the bonds so delivered as valid and lawful obligations. It turned out that the bonds were absolutely void, having never been lawfully put into circulation. Plaintiff thereupon sued defendant in the Circuit Court of the United States for the Eastern District of Louisiana, to recover the purchase money paid for them. It was held that the plaintiff could recover the sums paid by him for the bonds. Mr. Justice White in an elaborate opinion reviews the civil law authorities as well as those of the common law, and concludes that they both sustain a recovery by the plaintiff.

* The principal case, which might properly be considered under mistake of law, is inserted here for purposes of contrast.

they were made in good faith, and believed by both parties to be true, it is not averred that they were intended to be, or were understood by either party to be, a warranty. The points of fraud and warranty may, therefore, be laid out of view. They are in no sense elements in the case. This simplifies the character of the controversy. With these considerations eliminated, what is left of the case may be stated in a few words.

The legislature of Kansas passed two acts, under which the city of Topeka was authorized to issue bonds for certain specified purposes, the amount in each case to be within the limit prescribed. A hundred coupon bonds of one thousand dollars each, payable to a party named or bearer, were executed, and delivered to that party. They became the property of the First National Bank of Topeka. That bank put them upon the market, and disposed of them. Eighteen of them were sold to the plaintiffs in error for the sum of $12,852, and the residue to another party. There was default in the payment of interest. The other party brought suit. This court held that the legislature had no power to pass the acts, and that the bonds were, therefore, void. Loan Association v. Topeka, 20 Wall. 655, 22 L. Ed. 455. This suit was brought by the plaintiffs in error to recover from the receiver the amount paid to the bank for the eighteen bonds, with interest upon that sum. The ground relied upon is failure of consideration. The question presented for our determination is, whether, upon this state of facts, they have a valid cause of action.

In Lambert v. Heath, 15 Mees. & Wels. 486, the defendant bought for the plaintiff certain "certificates of Kentish-coast railway-scrip," and received from him the money for them. Subsequently the directors repudiated the scrip upon the ground that it had been issued by the secretary without authority. The enterprise to which it related was abandoned. The action, which was for money had and received, was thereupon brought to recover back what had been paid for the scrip. The court put it to the jury to say whether the scrip bought was "real Kentish railway-scrip." A verdict was found for the plaintiff upon this issue. A new trial was moved for, the defendant insisting that the court had misdirected the jury. After hearing the argument, the court said, "The question is simply this: Was what the parties bought in the market Kentish-coast railway-scrip? It appears that it was signed by the secretary of the company; and if this was the only Kentish-coast railway-scrip in the market, as appears to have been the case, and one person chooses to sell, and another to buy, that then the latter has got all that he contracted to buy. That was the question for the jury; but it was not so left to them. The rule must, therefore, be absolute for a new trial."

The judges were unanimous.

Here, also, the plaintiffs in error got exactly what they intended to buy, and did buy. They took no guaranty. They are seeking to re-

cover, as it were, upon one, while none exists. They are not clothed with the rights which such a stipulation would have given them. Not having taken it, they cannot have the benefit of it. The bank cannot be charged with a liability which it did not assume.

Such securities throng the channels of commerce, which they are made to seek, and where they find their market. They pass from hand to hand like bank-notes. The seller is liable ex delicto for bad faith; and ex contractu there is an implied warranty on his part that they belong to him, and that they are not forgeries. Where there is no express stipulation, there is no liability beyond this. If the buyer desires special protection, he must take a guaranty. He can dictate its terms, and refuse to buy unless it be given. If not taken, he cannot occupy the vantage-ground upon which it would have placed him.

It would be unreasonably harsh to hold all those through whose hands such instruments may have passed liable according to the principles which the plaintiffs in error insist shall be applied in this case. Judgment affirmed.[75]

MARTIN v. McCORMICK.

(Court of Appeals of New York, 1854. 8 N. Y. 331.)

The appeal in this action was from a judgment of the superior court of the city of New York. The questions decided arose upon the pleading. The following were the facts:

In 1839, the plaintiff became the owner in fee simple of a house and lot in the city of New York, worth six thousand dollars. On the first day of October, 1842, they were sold by order of the Mayor, Aldermen and Commonalty of the city, for the taxes assessed upon them for the years 1835, 1836 and 1838, amounting in the aggregate including interest and costs to $105.70. The defendant bid them in for the term of one hundred years, and thereby became entitled to a lease thereof on the first day of October, 1844, no redemption having then been made. In fact he did not obtain the lease, supposing that it was unnecessary for him to receive it before he should give the

[75] In Meyer v. Richards (1895) 163 U. S. 385, 414, 16 Sup. Ct. 1148, 1158, 41 L. Ed. 199 (see supra, page 158, note) White, J., discussing Otis v. Cullum, said: "If this [Meyer v. Richards] were a case where a vendee claimed to recover back the price paid by him on a purchase of negotiable securities, which pass by delivery from hand to hand, on the averment that after the sale it had developed that they were not valid (although not forgeries), because the law under which they had been issued was constitutionally void or ultra vires, the claim of implied warranty of existence would be without merit, for the reason that such a state of fact would present a case of a sale of securities whether valid or invalid, hence engendering no implication of warranty of existence. Under the state of facts thus supposed, the purpose of the parties to make a contract of that nature would legally result from the fact that they were both necessarily equally chargeable with notice of want of power, and therefore would be both presumed to have acted with reference to such knowledge. This is Otis v. Cullum."

notice to the tenant to redeem under the provisions of chapter 230 of the Laws of 1841. On the twelfth day of October, 1844, he caused the notice required by the statute, that the premises had been sold for the taxes and conveyed to him for one hundred years, and that unless he redeemed them within six months the conveyance would become absolute. The plaintiff a few days after the expiration of six months from the service of the notice, paid into the office of the comptroller of the city for the defendant and in redemption of the premises, the sum necessary for that purpose, but shortly after the payment the comptroller and the defendant informed him that the payment was at too late a day for redeeming, and that the conveyance to the defendant had become absolute, and the comptroller repaid to him the money, the defendant refusing to receive it.

On the first of July, 1845, the conveyance in pursuance of the bid at the tax sale, was made to the defendant.

On the third of July, 1845, the plaintiff believing the information conveyed in the notice served upon him in October, 1844, was true, and that the time to redeem the premises from the sale had expired before he paid the money to the comptroller in April, 1845, and that the defendant had thereby acquired an absolute title to the premises for the term of one hundred years, he purchased the lease and such term of the defendant, and paid him therefor $1,800. This sum he sought to recover as money received by the defendant to his use.

The defendant did not deny the fact that at the time the notice was given, October 12, 1844, the conveyance had not been made to him, but alleged that he was informed by the clerks in the comptroller's office that it was ready for him and that it made no difference whether he had it or not, and that at the time he sold his lease to the plaintiff, he was not aware that his conveyance had not become absolute. He also insisted that the lease was to be construed as of full force from its date, the first day of October, 1844, when he was entitled to receive it.

The action was tried before Mr. Justice Mason, at special term, who ordered a judgment for the defendant which was affirmed at general term. (See 4 Sandf. 366.) The plaintiff appealed to this court.

JOHNSON, J.[76] In this case the defendant was in possession of an instrument under the seal of the corporation of the city of New York, by which there purported to be created in him an estate for the term of one hundred years, in a house and lot of land in the city of New York. The plaintiff was at the time in possession of the house and lot, claiming to be and being seized thereof in fee, unless the lease held by the defendant created a valid term for years in him. The defendant as matter of fact believed the lease did give him the term which it purported to convey. The plaintiff also so believed, and thereupon a

[76] A portion of the opinion is omitted.

bargain was entered into between them in pursuance of which the plaintiff paid the defendant $1,800, and received in consideration thereof an assignment of the term. The plaintiff now seeks to recover back this money upon the general ground that the defendant, notwithstanding his apparent interest in the premises, had no estate in them whatever, the lease from the corporation being invalid, and that he purchased the lease and paid the money under an entire misapprehension and mistake as to the facts upon which depended the validity or invalidity of the defendant's lease. * * *

He [the plaintiff] has entered into a contract which has been executed, and his position is that of one seeking to rescind the contract and get back the consideration paid. No case of fraud is pretended; McCormick and the plaintiff both believed that the lease was valid, and one bought and the other sold under that belief.

The parties did not deal with each other upon the footing of the compromise of a doubtful or doubted claim, but upon the ground of a conceded right in the defendant. He was assumed by both of them to have become the owner of a term for one hundred years in the premises in question, and the parties dealt with each other upon that basis for the sale and purchase of that interest.

Then as to the subject-matter upon which the sale was to operate, the plaintiff having actually redeemed the premises before the execution of the lease to the defendant, the authority to convey which the corporation had acquired was defeated, and their lease was wholly inoperative to confer upon the defendant any right whatever, and had no more significance or efficacy in law than if it had remained unexecuted. It follows that the assignment executed by McCormick to Martin did not convey to him any right. The subject-matter to which it related had no existence. The plaintiff, in my judgment, occupies the same position which any other person would have occupied who had dealt with the defendant for the term of one hundred years and become the purchaser of it.

Now the term which was the subject of the contract, contrary to the supposition of both parties had no existence, and in all that class of cases, where there is mutual error as to the existence of the subject-matter of the contract, a rescission may be had. (1 Story's Eq., §§ 141, 142, 143.) The case of Hitchcock v. Giddings (4 Price, 135), was a bill by a vendee of a remainder in fee expectant upon an estate tail. A recovery had been suffered at the time of the contract, though both parties were ignorant of the fact, and there had been no fraud from knowledge or concealment of the fact, and it was decreed that a bond given for the purchase-money should be delivered up, and the interest which had been paid upon it should be refunded.

I do not see how the principle of this case can be distinguished from that at bar; for surely it can be no ground of difference in result, that in the one case an estate which had once existed had, at the time

of the contract, come to an end, while in the other, the estate, which was the subject of the contract, had no existence at any time. Allen v. Hammond, 11 Pet. 71, 9 L. Ed. 633.

The judgment below should be reversed, and the sale be declared rescinded, etc.

MASON, J., was in favor of modifying the judgment of the Superior Court so as to dismiss the complaint without prejudice to an action for specific relief.

Judgment reversed, etc.

TAYLOR v. HARE.

(Court of Common Pleas, 1805. 1 Bos. & P. [N. R.] 260.)

This was an action for money had and received, which came on to be tried before the Lord Chief Justice at the sittings after last Hilary term, when a verdict was found for the plaintiff for £425. subject to the opinion of the Court upon the following case:

On the 12th of September, 1791, the defendant took out a patent for the invention of an apparatus for preserving the essential oil of hops in brewing. By articles of agreement, dated 5th of November, 1792 (which were set out at length at the end of the case), and made between the defendant of the one part, and the plaintiff and his said late partner of the other part, reciting the defendant's patent, and that it gave him the sole power, privilege, and authority of using, exercising, and vending his said invention for the term of 14 years, the defendant granted to the plaintiff and his said late partner the privilege of making, using and exercising the said invention for the residue of the said term of 14 years, and in consideration thereof the plaintiff and his partner covenanted that they would secure to be paid to the defendant during the said term an annuity of £100., and would give their bond for that purpose, and a bond was accordingly given, conditioned for the payment of the said annuity. The plaintiff and his said late partner used the apparatus (for the making and preparing of which they paid a distinct price) from the date of the said agreement until the 25th day of March, 1797, and during all that time regularly paid the said annuity to the said defendant. The defendant was not the inventor of the invention for which he obtained his patent. The invention was not new as to the public use and service thereof in England, but it was the invention of one Thomas Sutton Wood, and had been publicly used in England by said Wood and others before the defendant obtained his patent. But the patent had never been repealed. The amount of the annuity which they had paid was £425. If the Court should be of opinion that the plaintiff was entitled to recover back the money which was paid on the bond, the verdict was to stand. If the Court should be of a contrary opinion, a nonsuit was to be entered.

Bayley, Serjt., for the plaintiff. To support the present action it is not necessary to prove that any imposition has been practised. If it appear that the plaintiff has received nothing in return for the money which he has paid, he is entitled to recover back his money in this form of action. He was induced to pay his money upon the supposition that the defendant had the power of communicating some privilege. But as it now appears that the defendant's invention was not new, and that the patent was therefore void, the consideration upon which the plaintiff paid his money has wholly failed, and the plaintiff has derived no benefit whatever. Where an estate is conveyed, the vendor professes to convey nothing but his title to that estate. But here the thing itself which was the subject of the agreement had no existence. It was the understanding of all parties that the defendant was entitled to a patent-right; but it now turns out that they were mistaken: the plaintiff therefore is entitled to recover the money which he has paid under a mistake. He had a right to make use of the invention without paying any thing for it. The defendant has no right to the annuity, and indeed he has already failed in an action on the bond in which the validity of the patent was put in issue.

Sir James Mansfield, Ch. J. (stopping Cockell, Serjt., for the defendant). It is not pretended that any action like the present has ever been known. In this case two persons equally innocent make a bargain about the use of a patent, the defendant supposing himself to be in possession of a valuable patent-right, and the plaintiff supposing the same thing. Under these circumstances the latter agrees to pay the former for the use of the invention, and he has the use of it; non constat what advantage he made of it; for any thing that appears he may have made considerable profit. These persons may be considered in some measure as partners in the benefit of this invention. In consideration of a certain sum of money the defendant permits the plaintiff to make use of this invention, which he would never have thought of using had not the privilege been transferred to him. How then can we say that the plaintiff ought to recover back all that he has paid? I think that there must be judgment for the defendant.

Heath, J. There never has been a case, and there never will be, in which a plaintiff, having received benefit from a thing which has afterwards been recovered from him, has been allowed to maintain an action for the consideration originally paid. We cannot take an account here of the profits. It might as well be said, that if a man lease land, and the lessee pay rent, and afterwards be evicted, that he shall recover back the rent, though he has taken the fruits of the land.

Rooke, J. I am of the same opinion.

Chambre, J. The plaintiff has had the enjoyment of what he stipulated for, and in this action the Court ought not to interfere, unless there be something ex æquo et bono which shews that the defendant ought to refund. Here both parties have been mistaken; the defendant has thrown away his money in obtaining a patent for his own

invention; not so the plaintiff, for he has had the use of another person's invention for his money. In the case of Arkwright's patent, which was not overturned till very near the period at which it would have expired, very large sums of money had been paid; and though something certainly was paid for the use of the machines, yet the main part was paid for the privilege of using the patent-right, but no money ever was recovered back which had been paid for the use of that patent. I am therefore of opinion that judgment of nonsuit should be entered.

Judgment of nonsuit.[77]

[77] "In an action by a licensor against a licensee to recover royalties upon sales made under an exclusive license upon an invalid patent, which was, at the time when the account accrued, apparently valid and in force, and from which there had been no eviction, the invalidity of which had not been declared by an adjudication under legal proceedings, and no notice had been given by the licensee of its refusal to pay on account of its defects, such invalidity is no defense to the suit. As long as the licensee continues to manufacture under a patent presumably valid, without having given notice of its invalidity and without eviction, he is presumed to manufacture in accordance with his license. The cases of Marston v. Swett (1876) 66 N. Y. 211, 23 Am. Rep. 43, and Id. (1880) 82 N. Y. 526, are leading authorities to this effect. The law is stated in Lawes v. Purser, 38 Eng. Law & Eq. Rep. 48, 6 El. & Bl. 930, by Erle, J., as follows: 'If the plaintiff believed the patent to be valid, and the defendants believed so, too, it seems to me that the defendants must pay for the privilege until they can show that the patent has been rescinded or revoked, or that notice has been given to the plaintiff that the defendant will not pay any more under the contract.' White v. Lee (C. C. 1882) 14 Fed. 789; Birdsall v. Perego (1865) 5 Blatchf. 251, Fed. Cas. No. 1,435; Stott v. Rutherford (1875) 92 U. S. 107, 23 L. Ed. 486; Eureka Co. v. Bailey Co. (1870) 11 Wall. 488, 20 L. Ed. 209." Per Shipman, J., in Holmes, Booth & Haydens v. McGill (1901) 108 Fed. 238, 244, 47 C. C. A. 296.

Where, however, there is a sale or an assignment of a patent, both parties believing the same to be valid, the authorities are in conflict on the question whether the purchase money, if already paid, may be recovered back, or, if such purchase money be not yet paid, whether the purchaser may resist payment, upon a discovery that the patent is in fact void. In Smith v. Neale (1857) 2 C. B. (N. S.) 67, Willes, J., delivering the judgment of the court said: "Such a contract involves no warranty that the invention was new, or was a manufacture within the statute of James, but merely that Her Majesty had granted to the plaintiff the letters-patent which she proposed to assign. In short, the defendant in this case, as in Hall v. Conder, 2 C. B. (N. S.) 22, contracted for the use of the plaintiff's right such as it was, without regard to whether it could be sustained upon litigation or not; and as there is nothing unreasonable or uncommon in such a bargain."

Accord: Hiatt v. Twoney (1836) 21 N. C. 315.

Contra—on the ground of failure of consideration: Lester v. Palmer (1862) 4 Allen (Mass.) 145; Geiger v. Cook (1842) 3 Watts & S. (Pa.) 266; Herzog v. Heyman (1897) 151 N. Y. 587, 45 N. E. 1127, 56 Am. St. Rep. 646.

Compare Gilmore v. Aiken (1875) 118 Mass. 94.

In Massachusetts a distinction is made between an exclusive license and a mere license; the former being assimilated to an assignment of the patent. Harlow v. Putnam (1878) 124 Mass. 553; Standard Button Fastening Co. v. Ellis (1893) 159 Mass. 448, 34 N. E. 682.

IV. Mistake as to Nature of Subject-Matter of a Contract

COX v. PRENTICE.

(Court of King's Bench, 1815. 3 Maule & S. 345.)

Assumpsit. The plaintiffs declared that in consideration that they would buy of the defendant a bar of silver, the defendant undertook that it contained 4 oz., whereas it contained only 2 oz. There were other special counts, with the money counts. Plea, non-assumpsit. At the trial before Lord Ellenborough, C. J., at the London sittings the case was this:

The plaintiffs were gold refiners, and the defendant was a watchmaker, and had a correspondent at Gibraltar, from whom he was in the habit of receiving broken metal. His correspondent remitted to him a bar of silver, which he carried to the plaintiffs' house, and they melted it down in his presence. The plaintiffs afterwards procured it to be assayed by a third person, who was paid by the defendant; and the plaintiffs paid to the defendant £88. and a fraction, the supposed value of the silver, according to the assay-master's certificate. The defendant informed his correspondent of what had been done, and credited him in his account with the amount. The plaintiffs sold the silver to a house at Birmingham, who afterwards returned it, representing that it did not answer the assay; upon which the plaintiffs applied to the defendant for a return of the money, offering to return him the silver; but the defendant refused to return the money, on the ground that he had forwarded his account to his correspondent, in which he had credited him with the full sum. It appeared, however, that the account was still unsettled between them. The assay-master proved that he received a small piece of the silver for the purpose of assaying it; that he by his assay made the whole 4 oz., whereas 2 oz. 7 cwts. was the true assay. A verdict was found for the plaintiffs for the difference in value between the supposed and true weight, with liberty to the defendant to move for a nonsuit. A rule nisi was accordingly obtained in Michaelmas term upon two grounds; 1st, that the action would not lie at all even supposing it to have been brought against the defendant's principal; 2dly, supposing it would lie against his principal, yet it would not against the defendant, who was merely an agent, and whose situation had been altered between the time of the sale and action by his having accounted for the sale money with his principal.

Lord Ellenborough, C. J. I take it to be clear that an agent who receives money for his principal is liable as a principal so long as he stands in his original situation; and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it. Here it is admitted that no money has been paid over by the defendant to his principal, nor has there

been any other thing done by him to create a change of circumstances. The only question then is, whether the action lies against the defendant, considering it as if it were an action against the principal. Now this is a case of mutual innocence and equal error, which is not an unusual case for money had and received. Much of the argument has been raised by the circumstance of a third person having been introduced into this transaction; but the nature of the commodity made the intervention of some other standard than the parties' own judgment necessary. And whether that be attained by means of a pair of scales, or any other common measure, or whether an assay-master be employed for the purpose, being equally necessary, it can make no difference. Let us then put the case of parties agreeing to abide by the weighing of any article at any particular scales, and in the weighing an error, not perceived at the time, takes place from an accidental misreckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon, would not in that case money had and received be sustainable?[78] But it has been argued, as if the assay-master's not having the whole bar was imputable to the laches of the plaintiffs. But the assay-master might have chosen his own course; it was for him to determine what he wanted. If indeed he is to be considered as the agent only of one party, I rather think he was the agent of the defendant; but I take him to have been the agent for both. Our decision will not clash with the rule, caveat emptor; for here both parties were under a mutual error, neither of them being [able] to exercise nor exercising any judgment upon the subject. I think this is the proper case for money had and received.

LE BLANC, J.[79] * * * As a general proposition, it may be true that when an article is sold, which turns out to be of less value than the price given for it, the extra price, if there be no fraud, cannot be recovered back. But that is a rule applicable only to cases where the thing is of an arbitrary value; and the fallacy lies in applying the rule of law to this case when the thing is not of an arbitrary value, but depends upon the quantity of silver it contains. It is just like the case of a purchase of any commodity by weight, the price of which is to be fixed by the weighing; and if the weight turns out to be less than that paid for, can there be a doubt that the party selling is bound to refund? So here the price was to be fixed by the quantity of silver to be ascertained by the assay of the assay-master.

BAYLEY, J. I have no doubt that this action for money had and received will lie, and that the defendant is liable. The assay-master was a middle-man; or, if he was the agent of either, he was more so of the defendant than of the plaintiff. The rule, caveat emptor, does not apply to this case; for neither party exercised his own judgment.

[78] Compare Devine v. Edwards (1881) 101 Ill. 138, page 54, supra. See, also, Wheadon v. Olds (1838) 20 Wend. (N. Y.) 174, page 73, supra.

[79] A portion of the opinion of Le Blanc, J., and the concurring opinion of Dampier, J., are omitted.

What did the plaintiffs bargain to buy and the defendant to sell? They both understand that the one agreed to buy and the other to sell a bar containing such a quantity of silver, as should appear by the assay; and the quantity is fixed by the assay, and paid for; but through some mistake in the assay the bar turns out not to contain the quantity represented, but a smaller quantity. The plaintiff therefor may rescind the contract, and bring money had and received, having offered to return the bar of silver. Upon the 2d point, Buller v. Harrison, Cowper, 566, is precisely in point. That case decides that if things remain in the same state, as they did here, the action will lie against the agent. Rule discharged.[80]

GOMPERTZ v. BARTLETT.

(Court of King's Bench, 1853. 2 El. & Bl. 849.)

Action for money had and received. Plea: Never indebted. Issue thereon.

On the trial, before Lord Campbell, C. J., at the sittings at Guildhall after last Trinity Term, it appeared that the defendant, in London, sold to the plaintiff a bill of exchange purporting to be drawn at Sierra Leone by Jolly & Co. of that place on Bellot & Co. of London, and accepted by Bellot & Co. payable to the order of a third person in London. The instrument was indorsed in blank by the payee; it was unstamped; but both parties believed it to be a foreign bill and consequently to require no stamp. The defendant did not indorse the bill; and it was a sale without recourse. The plaintiff paid £815. to the defendant, as the price of the bill, which was handed to plaintiff: and he, in like manner, sold the bill to another person, also without recourse. Before the bill attained maturity, all the parties to the bill became bankrupt. On the holder seeking to prove against the estate of the acceptor, it was discovered that the bill, though bearing the genuine signature of a Sierra Leone firm, had, in fact, been drawn by one of the partners in this kingdom, and consequently was unavailable for want of a stamp. The Commissioners in Bankruptcy refused to allow the proof. The holder demanded back from the plaintiff the price paid to him: and the plaintiff, under threat of legal proceedings, paid him. The plaintiff now sought to recover from the defend-

[80] But see Cleveland-Cliffs Iron Co. v. East Itasca Mining Co. (1906) 146 Fed. 232, 76 C. C. A. 598. In this case the parties contracted for a lease of iron ore land at a rate of seven cents per gross ton, the amount of ore to be computed according to certain explorations based on the customary assumption that a drill hole would properly disclose the condition of the earth within a radius of 100 feet. This assumption, however, proved to be erroneous, owing to the undisclosed presence of taconite in large quantities, which rendered the ore far less valuable than estimated. Held, that this mistake did not entitle the lessees to sue for an overpayment, because the parties contracted in view of all the uncertainties attendant upon the customary method of estimating the value of ore by exploration.

ant £815., the price of the bill, as money paid on a consideration which had failed. It was admitted that the defendant, at the time of the sale, bona fide believed the bill to have been drawn at Sierra Leone; and neither fraud nor negligence was imputed to him.

The Lord Chief Justice directed a nonsuit, with leave to move to enter a verdict for the plaintiff. Petersdorff, in this term, obtained a rule nisi accordingly.

Lord Campbell, C. J. At the trial, I was impressed with the consideration that this was a transaction of pure sale, and that the vendor really had title to the bill which he sold, and was perfectly ignorant of the latent defect. Besides, the bill would probably have in fact been paid had the parties to it continued solvent; and on the whole I was then inclined to think that the defect was merely one in the quality, which the vendor did not warrant. But, now, having heard the argument, I think that the action is maintainable, on the ground that the article does not answer the description of that which was sold, viz., a foreign bill. There was no written statement or direct assertion that this bill was drawn at Sierra Leone; but it purported to be so drawn; and it must be taken that it was sold by the description of a bill drawn at Sierra Leone. In fact it was drawn in London; and, on that account, it could not be enforced. If it really had been a foreign bill, any secret defect would have been at the risk of the purchaser; but this is not a case in which an article answering the description by which it is sold has a secret defect, but one in which the article is not of the kind which was sold. I think, therefore, that the money paid for it may be recovered as paid in mistake of facts. The law is, I think, accurately laid down in the passage cited from Addison on Contracts. If, being what was sold, the bill was valueless because of the insolvency of the parties, the vendor would not be answerable; but he is answerable if the bill be spurious. Jones v. Ryde (5 Taunt. 488) and Young v. Cole (3 New Ca. 724) are strongly in point. Young v. Cole (3 New Ca. 724) is indeed a very strong case; for the things sold there as Guatemala bonds were in one sense of the words Guatemala bonds; but they were not what was professed to be sold, viz. bonds binding on the Guatemala government. The case is precisely as if a bar was sold as gold, but was in fact brass, the vendor being innocent. In such a case the purchaser may recover.

Coleridge, J. I am of the same opinion. What took place at the time of the sale was merely that the vendor did not indorse the bill, and stipulated in effect that this should be a sale without warranty. That being so, the vendor was not bound to see that he sold a bill of good quality, or to answer for the insolvency of the parties; but the vendee is still entitled to have an article answering the description of that which he bought. Here he bought, as a foreign bill, what turns out not to be a foreign bill, and therefore valueless. Common justice requires that he should have back the price.

Wightman, J. I agree upon this ground, that what was sold pur-

ported to be a bill drawn at Sierra Leone and available against the parties to it, but, so far from answering that description, was a bill not drawn at Sierra Leone, but in England, and, being unstamped, was unavailable. Wherever the article answers the description by which it is sold, and it turns out that there is a latent defect, in the absence of fraud and warranty, the vendee must take it with all faults. But this is a case in which it does not answer the description. And therefore on the authorities, more especially on that of Jones v. Ryde (5 Taunt. 488), the plaintiff is entitled to recover.

Rule absolute.[81]

CHAPMAN v. COLE.

(Supreme Judicial Court of Massachusetts, 1858. 12 Gray, 141, 71 Am. Dec. 739.)

Action of tort for the conversion of a gold coin. The parties submitted the case to the decision of the court upon the following statement of facts:

The coin, which was a ten dollar gold piece, known as California money of "Moffat's issue," and not United States issue, was passed by mistake for a half dollar by one of the plaintiffs to S. A. Furbush, and by Furbush, under a like mistake, to the defendant, who received it as such, and took it without any knowledge of any previous transac-

[81] In Jones v. Ryde (1814) 5 Taunton, 488, the plaintiffs discounted for the defendants a navy bill in the sum of £1,883. 16s. 3d. The amount of the bill had been fraudulently raised by a previous holder from £883. 16s. 3d. and on presentation to the Navy Pay Office plaintiffs were able to collect only that amount. Plaintiffs then brought assumpsit for money had and received against defendant to recover the £1,000. overpaid by them in discounting the bill. The court upheld a verdict for plaintiff; Gibbs, C. J., in the course of his opinion, saying; "Both parties were mistaken in the view they had of this navy bill; the one in representing it to be a navy bill of this description; the other in taking it to be such. Upon its afterwards turning out that this bill was to a certain extent a forgery, we think he who took the money ought to refund it to the extent to which the bill is invalid. * * * In the present case the navy bill is not such as it purported to be, and therefore the plaintiff is entitled to recover. A case somewhat similar very frequently occurs in practice, on which I should not rely as governing the law, but that it is said, by my Brother Lens, to be sanctioned on the authority of a case so decided at nisi prius, by Mansfield, C. J., namely, where forged bank notes are taken. The party negotiating them, is not, and does not profess to be, answerable that the Bank of England shall pay the notes; but he is answerable for the bills being such as they purport to be."

In McClure v. Central Trust Co. (1900) 165 N. Y. 108, 58 N. E. 777, 53 L. R. A. 153, the defendant advertised that it was authorized to receive subscriptions to stock of a certain English company, such stock to be issued full paid and nonassessable. Plaintiff subscribed to some of this stock, but the defendant declined to deliver the same except subject to an incumbrance. Held, that there was an implied warranty that defendant would deliver marketable stock i. e., that which was unincumbered; thus plaintiff might rescind upon breach of this contract and recover the money paid by him.

The opinion contains a good discussion of the history and rationale of the doctrine of implied warranty, page 121 et seq.

tion concerning it between Furbush and the plaintiffs; but during the same evening the defendant had reason to believe that the coin was a California ten dollar gold piece.

One of the plaintiffs afterwards demanded the coin of the defendant, claiming it as their property, and tendered half a dollar therefor, and the defendant refused to deliver it, admitting at the same time that it was in his possession. Similar pieces, called "Moffat's issue," pass as currency in California, and are worth ten dollars.

If this action can be maintained, the plaintiffs are to have judgment for the sum of ten dollars as damages; otherwise, judgment is to be entered for the defendant.

METCALF, J. The property in the gold piece never passed from plaintiffs to Furbush; the possession thereof having passed from them to him by mistake. The plaintiffs intended to pay to him fifty cents in money, and he intended to receive from them that sum in money; and both parties supposed that what they intended to do had been done. By a mistake of both parties, a chattel worth ten dollars, but supposed to be half a dollar in money, was delivered by the plaintiffs, and received by Furbush, as half a dollar, in payment of that sum. There was a mistake as to the identity of the subject of the agreement; and in such case there is no assent of the parties, and no binding transaction.

As Furbush acquired no property in the gold piece, he could convey none to the defendant. The plaintiffs may therefore well maintain an action, in this form, against the defendant. The defendant, by receiving the plaintiff's gold piece of Furbush, and claiming it as his own, was guilty of a conversion of it, and the present action might have been maintained without a previous demand on him for it. Stanley v. Gaylord, 1 Cush. 536, 48 Am. Dec. 643. And if this were not so, yet as a demand was made on him for it, and he refused to deliver it, when it was in his power forthwith to do so, there is sufficient evidence of conversion, in the absence of any fact tending to rebut or control that evidence.

If the gold piece had been an eagle of American money, passed by mistake for a half dollar piece to Furbush, and by him to the defendant, we do not suppose that this action could have been maintained. The plaintiffs' remedy would have been against Furbush, in an action of contract for $9.50 money had and received. See Bretton v. Barnet, Owen, 86. "It would be mischievous," says Chief Justice Parker, "to require of persons, who receive money in the way of business, or in payment of debts, to look into the authority of him from whom they receive it." Mason v. Waite, 17 Mass. 563. Even when money is stolen, and is passed by the thief, it becomes the property of him to whom it is passed for a valuable consideration, and without knowledge that it was stolen. Miller v. Race, 1 Bur. 452. It is otherwise when stolen chattels are sold to an honest buyer. He acquires no title to them, and is liable to the owner in an action of tort. Dame

v. Baldwin, 8 Mass. 518; 2 Bl. Com. 449. As this gold piece was not money, the rules of law which apply to other chattels must be applied to it.

Judgment for the plaintiffs.

WOOD v. BOYNTON.

(Supreme Court of Wisconsin, 1885. 64 Wis. 265, 25 N. W. 42, 54 Am. Rep. 610.)

Appeal from circuit court for Milwaukee county.

TAYLOR, J. This action was brought in the circuit court for Milwaukee county to recover the possession of an uncut diamond of the alleged value of $1,000. The case was tried in the circuit court, and after hearing all the evidence in the case, the learned circuit judge directed the jury to find a verdict for the defendants. The plaintiff excepted to such instruction, and, after a verdict was rendered for the defendants, moved for a new trial upon the minutes of the judge. The motion was denied, and the plaintiff duly excepted, and after judgment was entered in favor of the defendants, appealed to this court. The defendants are partners in the jewelry business. On the trial it appeared that on and before the twenty-eighth of December, 1883, the plaintiff was the owner of and in the possession of a small stone of the nature and value of which she was ignorant; that on that day she sold it to one of the defendants for the sum of one dollar. Afterwards it was ascertained that the stone was a rough diamond, and of the value of about $700. After hearing this fact the plaintiff tendered the defendants the one dollar, and ten cents as interest, and demanded a return of the stone to her. The defendants refused to deliver it, and therefore she commenced this action.

The plaintiff testified to the circumstances attending the sale of the stone to Mr. Samuel B. Boynton, as follows: "The first time Boynton saw that stone he was talking about buying the topaz, or whatever it is, in September or October. I went into the store to get a little pin mended, and I had it in a small box,—the pin,—a small ear-ring; * * * this stone, and a broken sleeve-button were in the box. Mr. Boynton turned to give me a check for my pin. I thought I would ask him what the stone was, and I took it out of the box and asked him to please tell me what that was. He took it in his hand and seemed some time looking at it. I told him I had been told it was a topaz, and he said it might be. He says, 'I would buy this; would you sell it?' I told him I did not know but what I would. What would it be worth? And he said he did not know; he would give me a dollar and keep it as a specimen, and I told him I would not sell it; and it was certainly pretty to look at. He asked me where I found it, and I told him in Eagle. He asked about how far out, and I said right in the village and I went out. Afterwards, and about the twenty-eighth of Decem-

ber, I needed money pretty badly, and thought every dollar would help, and I took it back to Mr. Boynton and told him I had brought back the topaz, and he says, 'Well, yes; what did I offer you for it?' and I says, 'One dollar;' and he stepped to the change drawer and gave me the dollar, and I went out." In another part of her testimony she says: "Before I sold the stone I had no knowledge whatever that it was a diamond, I told him that I had been advised that it was probably a topaz, and he said probably it was. The stone was about the size of a canary bird's egg, nearly the shape of an egg,—worn pointed at one end; it was nearly straw color,—a little darker." She also testified that before this action was commenced she tendered the defendants $1.10, and demanded the return of the stone, which they refused. This is substantially all the evidence of what took place at and before the sale to the defendants, as testified to by the plaintiff herself. She produced no other witness on that point.

The evidence on the part of the defendant is not very different from the version given by the plaintiff, and certainly is not more favorable to the plaintiff. Mr. Samuel B. Boynton, the defendant to whom the stone was sold, testified that at the time he bought this stone, he had never seen an uncut diamond; had seen cut diamonds, but they are quite different from the uncut ones; "he had no idea this was a diamond, and it never entered his brain at the time." Considerable evidence was given as to what took place after the sale and purchase, but that evidence has very little if any bearing, upon the main point in the case.

This evidence clearly shows that the plaintiff sold the stone in question to the defendants, and delivered it to them in December, 1883, for a consideration of one dollar. The title to the stone passed by the sale and delivery to the defendants. How has that title been divested and again vested in the plaintiff? The contention of the learned counsel for the appellant is that the title became vested in the plaintiff by the tender to the Boyntons of the purchase money with interest, and a demand of a return of the stone to her. Unless such tender and demand revested the title in the appellant, she cannot maintain her action. The only question in the case is whether there was anything in the sale which entitled the vendor (the appellant) to rescind the sale and so revest the title in her. The only reasons we know of for rescinding a sale and revesting the title in the vendor so that he may maintain an action at law for the recovery of the possession against his vendee are (1) that the vendee was guilty of some fraud in procuring a sale to be made to him; (2) that there was a mistake made by the vendor in delivering an article which was not the article sold, —a mistake in fact as to the identity of the thing sold with the thing delivered upon the sale. This last is not in reality a rescission of the sale made, as the thing delivered was not the thing sold, and no title ever passed to the vendee by such delivery.

In this case, upon the plaintiff's own evidence, there can be no just

ground for alleging that she was induced to make the sale she did by any fraud or unfair dealings on the part of Mr. Boynton. Both were entirely ignorant at the time of the character of the stone and of its intrinsic value. Mr. Boynton was not an expert in uncut diamonds, and had made no examination of the stone, except to take it in his hand and look at it before he made the offer of one dollar, which was refused at the time, and afterwards accepted without any comment or further examination made by Mr. Boynton. The appellant had the stone in her possession for a long time, and it appears from her own statement that she had made some inquiry as to its nature and qualities. If she chose to sell it without further investigation as to its intrinsic value to a person who was guilty of no fraud or unfairness which induced her to sell it for a small sum, she cannot repudiate the sale because it is afterwards ascertained that she made a bad bargain. Kennedy v. Panama, etc., Mail Co., L. R. 2 Q. B. 580.

There is no pretense of any mistake as to the identity of the thing sold. It was produced by the plaintiff and exhibited to the vendee before the sale was made, and the thing sold was delivered to the vendee when the purchase price was paid. Kennedy v. Panama, etc., Mail Co., supra., 587; Street v. Blay, 2 Barn. & Adol. 456; Gompertz v. Bartlett, 2 El. & Bl. 849; Gurney v. Womersley, 4 El. & Bl. 133; Ship's Case, 2 De G. J. & S. 544. Suppose the appellant had produced the stone, and said she had been told it was a diamond, and she believed it was, but had no knowledge herself as to its character or value, and Mr. Boynton had given her $500 for it, could he have rescinded the sale if it had turned out to be a topaz or any other stone of very small value? Could Mr. Boynton have rescinded the sale on the ground of mistake? Clearly not, nor could he rescind it on the ground that there had been a breach of warranty, because there was no warranty, nor could he rescind it on the ground of fraud, unless he could show that she falsely declared that she had been told it was a diamond, or, if she had been so told, still she knew it was not a diamond. See Street v. Blay, supra.

It is urged, with a good deal of earnestness, on the part of the counsel for the appellant that, because it has turned out that the stone was immensely more valuable than the parties at the time of the sale supposed it was, such fact alone is a ground for the rescission of the sale, and that fact was evidence of fraud on the part of the vendee. Whether inadequacy of price is to be received as evidence of fraud, even in a suit in equity to avoid a sale, depends upon the facts known to the parties at the time the sale is made.

When this sale was made the value of the thing sold was open to the investigation of both parties, neither knowing its intrinsic value, and, so far as the evidence in this case shows, both supposed that the price paid was adequate. How can fraud be predicated upon such a sale, even though after-investigation showed that the intrinsic value of the thing sold was hundreds of times greater than the price paid?

It certainly shows no such fraud as would authorize the vendor to rescind the contract and bring an action at law to recover the possession of the thing sold. Whether that fact would have any influence in an action in equity to avoid the sale we need not consider. See Stettheimer v. Killip, 75 N. Y. 287; Etting v. Bank of U. S., 11 Wheat. 59, 6 L. Ed. 419.

We can find nothing in the evidence from which it could be justly inferred that Mr. Boynton, at the time he offered the plaintiff one dollar for the stone, had any knowledge of the real value of the stone, or that he entertained even a belief that the stone was a diamond. It cannot, therefore, be said that there was a suppression of knowledge on the part of the defendant as to the value of the stone which a court of equity might seize upon to avoid the sale. The following cases show that, in the absence of fraud or warranty, the value of the property sold, as compared with the price paid, is no ground for a rescission of a sale. Wheat v. Cross, 31 Md. 99, 1 Am. Rep. 28; Lambert v. Heath, 15 Mees. & W. 487; Bryant v. Pember, 45 Vt. 487; Kuelkamp v. Hidding, 31 Wis. 503–511. However unfortunate the plaintiff may have been in selling this valuable stone for a mere nominal sum, she has failed entirely to make out a case either of fraud or mistake in the sale such as will entitle her to a rescission of such sale so as to recover the property sold in an action at law.

The judgment of the circuit court is affirmed.[82]

[82] In Sherwood v. Walker (1887) 66 Mich. 568, 33 N. W. 919, 11 Am. St. Rep. 531, the defendant sold to the plaintiff a blooded cow at a certain price per pound, which amounted to $80. The parties at the time of sale believed that the cow was barren. It later turned out that the cow was with calf, which would make her value between $750 and $1,000, and the defendant refused to deliver, claiming that he was entitled to rescind the contract for mistake. The plaintiff then brought an action of replevin. The court held for defendant, Morse, J., in the majority opinion, saying: "It seems to me, however, in the case made by this record, that the mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder, she was worth at least $750; if barren, she was worth not over $80. The parties would not have made the contract of sale except upon the understanding and belief that she was incapable of breeding, and of no use as a cow. It is true she is now the identical animal that they thought her to be when the contract was made; there is no mistake as to the identity of the creature. Yet the mistake was not of the mere quality of the animal, but went to the very nature of the thing. A barren cow is substantially a different creature than a breeding one. There is as much difference between them for all purposes of use as there is between an ox and a cow that is capable of breeding and giving milk. If the mutual mistake had simply related to the fact whether she was with calf or not for one season, then it might have been a good sale, but the mistake affected the character of the animal for all time, and for its present and ultimate use. She was not in fact the animal, or the kind of animal, the defendants intended to sell or the plaintiff to buy. She was not a barren cow, and, if this fact had been known, there would have been no contract. The mistake affected the substance of the whole consideration, and it must be considered that there was no contract to sell or sale of the cow as she actually was. The thing sold and bought had in fact no existence. She was sold as a beef creature would be sold; she is in fact a breeding cow, and a valuable one. The court should have instructed the jury that if they found that the cow was sold, or contracted to be sold, upon the understanding of both parties that she was barren, and useless for

HECHT v. BATCHELLER.

(Supreme Judicial Court of Massachusetts, 1888. 147 Mass. 335, 17 N. E. 651, 9 Am. St. Rep. 708.)

Contract for money had and received. The case was tried in the Superior Court, without a jury, before Mason, J., upon an agreed statement of facts. The judge found for the plaintiffs, and the defendants alleged exceptions.

MORTON, C. J.[83] The defendants, being the owners of a promissory note which they had taken in the ordinary course of business, sold it through a broker to the plaintiffs. It was afterwards ascertained that, two hours before this sale, the makers of the note had made "a voluntary assignment of all their assets for the benefit of their creditors, to be administered under the insolvent laws of Ohio," of which state they were residents. Neither of the parties to this suit, nor the broker employed by the defendants, knew of the assignment at the time of the sale, but they all supposed that the makers were doing business as theretofore. The plaintiffs contend that they are entitled to recover upon either of two grounds: First, that there was a mutual mistake of the parties as to the thing sold, and therefore no contract was completed between them; and, second, that there was a warranty, express or implied, by the defendants, that the makers of the note were then carrying on business, and had not failed or made an assignment.

1. It is a general rule that where parties assume to contract, and there is a mistake as to the existence or identity of the subject-matter,

the purpose of breeding, and that in fact she was not barren, but capable of breeding, then the defendants had a right to rescind, and to refuse to deliver, and the verdict should be in their favor."

Sherwood, J., in a dissenting opinion took a different view of the case, as follows: "The defendants sold the cow for what they believed her to be, and the plaintiff bought her as he believed she was, after the statements made by the defendants. No conditions whatever were attached to the terms of sale by either party. It was in fact as absolute as it could well be made, and I know of no precedent as authority by which this court can alter the contract thus made by these parties in writing,—interpolate in it a condition by which, if the defendants should be mistaken in their belief that the cow was barren, she could be returned to them and their contract should be annulled. * * * There was no difference between the parties, nor misapprehension, as to the substance of the thing bargained for, which was a cow supposed to be barren by one party, and believed not to be by the other. As to the quality of the animal, subsequently developed, both parties were equally ignorant, and as to this each party took his chances. If this were not the law, there would be no safety in purchasing this kind of stock. I entirely agree with my Brethren that the right to rescind occurs whenever 'the thing actually delivered or received is different in substance from the thing bargained for, and intended to be sold'; but if it be only a difference in some quality or accident, even though the misapprehension may have been the 'actuating motive' of the parties in making the contract, yet it will remain binding. In this case the cow sold was the one delivered. What might or might not happen to her after the sale formed no element in the contract."

[83] The statement of facts and a portion of the opinion are omitted.

there is no contract, because of the want of the mutual assent necessary to create one; so that, in the case of a contract for the sale of personal property, if there is such mistake, and the thing delivered is not the thing sold, the purchaser may refuse to receive it, or, if he receives it, may, upon discovery of the mistake, return it, and recover back the price he has paid. But to produce this result the mistake must be one which affects the existence or identity of the thing sold. Any mistake as to its value or quality, or other collateral attributes, is not sufficient if the thing delivered is existent, and is the identical thing in kind which was sold. Gardner v. Lane, 9 Allen, 492, 85 Am. Dec. 779; Id., 12 Allen, 39; Spurr v. Benedict, 99 Mass. 463; Iron Co. v. Insurance Co., 134 Mass. 433; 1 Benj. Sales, § 54.

In the case at bar, the subject-matter of the contract was the note of J. & S. B. Sachs. The note delivered was the same note which the parties bought and sold. They may both have understood that the makers were solvent, whereas they were insolvent; but such a mistake or misapprehension affects the value of the note, and not its identity. Day v. Kinney, 131 Mass. 37. In the case of Day v. Kinney, ubi supra, the makers of the note sold were in fact insolvent, but they had not stopped payment, or been adjudged insolvent, and the decision is confined to the facts of the case. But we think the same principles apply in this case. The makers of the note had made an assignment for the benefit of their creditors; but this did not extinguish the note, or destroy its identity. It remained an existing note, capable of being enforced, with every essential attribute going to its nature as a note which it had before. Its quality and value were impaired, but not its identity. The parties bought and sold what they intended, and their mistake was not as to the subject-matter of the sale, but as to its quality. We are therefore of opinion that the sale was valid, and that the plaintiffs cannot recover the amount they paid as upon a failure of consideration. * * *

We think the principles we have stated are decisive of the case before us. The defendants sold the note in good faith. So far as the evidence shows, neither party, at the time of the sale, spoke of or inquired about or knew anything about the failure of the makers. They stood upon an equal footing, and they had equal means of knowing the standing of the maker. It was understood that the defendants were selling the note without recourse to them. They did not expressly warrant the value of the note, and we are of opinion that no warranty could fairly be inferred from the circumstances of the solvency of the makers, or that they continued in business.

We are therefore of opinion that the first three instructions requested by the defendants should have been given, and that, upon the facts of the case, the court was not justified in finding for the plaintiffs. Exceptions sustained.

CONNER v. HENDERSON.

(Supreme Judicial Court of Massachusetts, 1818. 15 Mass. 319, 8 Am. Dec. 103.)

This was an action of the case in assumpsit, alleging that the defendant undertook to sell and deliver to the plaintiff eighty-nine casks of lime of good quality, but in fact delivered to him eighty-nine casks of lime of little value, not merchantable. There was a second count much like the first; and a third count for money had and received.

Trial on the general issue, before Putnam, J., at the sittings here after the last November term. The plaintiff produced the defendant's bill of parcels of 89 casks of lime to the plaintiff at 10s., amounting to 148 dollars 33 cents. It was proved that the casks were branded by one D. Jenks, Jun., an inspector of lime; and there was satisfactory evidence that the contents of the casks were of no value, being a mixture of sand and stones, and wholly unfit for use as lime.

It was admitted by the plaintiff that he had sold, and charged to his customers, about thirty casks, which had not been paid for, except two which were sold and paid for at two dollars per cask, the plaintiff and his customers then supposing the casks to contain good lime.

There was no evidence of a special warranty of the defendant that the lime was good; nor any evidence that he knew it was bad. The defendant was master of a coasting vessel, and had received the casks of one G. Sevey at Thomastown, to carry on freight to Boston, and to sell on Sevey's account. It did not appear, however, that the defendant disclosed his principal to the plaintiff; nor had this latter returned the casks, which he had not sold as aforesaid.

The judge instructed the jury that if, from the evidence, they believed the defendant had not practised any fraud, they must find a verdict for him upon the two first counts; because the delivery of the casks with the inspector's brand, together with a bill of the same, did not amount to a warranty of the contents, of which the defendant might be ignorant; that, to charge him upon those counts, they must find fraud or warranty on his part; but that, in respect to the count for money had and received, it was recoverable where the money had been received by the defendant by mistake, or where the consideration had failed, although no fraud had been practised by him; and if they should believe, from the evidence, that the plaintiff intended to buy, and the defendant to sell, 89 casks of lime, and not 89 casks without lime; and that the casks which he delivered did not contain lime, but stones and stuff of no value, that the consideration of the contract had failed, although the defendant had no bad intentions; and the plaintiff might recover the money he had paid upon the contract, and consider it as rescinded, notwithstanding he had not redelivered the casks

before he brought his action, he being accountable to the defendant for the same.

The jury found a verdict for the defendant upon the two first counts, and for the plaintiff upon the money count, on the ground above stated by the judge. And if, upon the facts, the plaintiff was entitled, in the opinion of the Court, to recover upon either of the counts, judgment was to be entered upon the verdict; otherwise, it was to be set aside, and the plaintiff to become nonsuit.

PER CURIAM. The evidence reported will not maintain the action on either of the first two counts. There was no express warranty respecting the quality of the article. Neither can the plaintiff recover on his count for money had and received. If he would have rescinded the contract, and so have entitled himself to a return of the money paid, it was necessary that he put the defendant in the same situation he was in before the delivery of the article. This was settled in the case of Kimball v. Cunningham; and although the principal subject of the contract, in the present case, may be presumed, from the evidence reported, to have been absolutely of no value, and so the returning of it would have been but an idle act, yet the casks were of some value, and should have been restored, if the plaintiff would treat the sale as a nullity, and demand his money as paid without consideration.

We think, however, that an action may be framed, in which the plaintiff may recover, on the evidence reported. He may therefore file a new declaration, on which a trial may be had; but he cannot have his costs arising prior to the present time.

V. SPECIAL RULES AS TO NEGOTIABLE PAPER

PRICE v. NEAL.

(Court of King's Bench, 1762. 3 Burr. 1354.)

This was a special case reserved at the sittings at Guildhall after Trinity term, 1762, before Lord Mansfield.

It was an action upon the case brought by Price against Neal; wherein Price declares that the defendant Edward Neal was indebted to him in £80, for money had and received to his the plaintiff's use; and damages were laid to £100. The general issue was pleaded; and issue joined thereon.

It was proved at the trial, that a bill was drawn as follows—"Leicester, 22d November, 1760. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, sir, your humble servant Benjamin Sutton. To Mr. John Price in Bush-Lane Cannon-Street, London;" indorsed "R. Ruding, Antony Topham, Hammond and Laroche. Received the contents, James Watson and Son: witness Edward Neal."

That this bill was indorsed to the defendant for a valuable consideration; and notice of the bill left at the plaintiff's house, on the day it became due. Whereupon the plaintiff sent his servant to call on the defendant, to pay him the said sum of £40. and take up the said bill; which was done accordingly.

That another bill was drawn as follows—"Leicester, 1st February, 1761. Sir, six weeks after date pay Mr. Rogers Ruding or order forty pounds, value received for Mr. Thomas Ploughfor; as advised by, sir, your humble servant Benjamin Sutton. To Mr. John Price in Bush-Lane, Cannon-Street, London." That this bill was indorsed, "R. Ruding, Thomas Watson and Son. Witness for Smith, Right and Co." That the plaintiff accepted this bill, by writing on it, "Accepted John Price:" and that the plaintiff wrote on the back of it—"Messieurs Freame and Barclay, pray pay forty pounds for John Price."

That this bill being so accepted was indorsed to the defendant for a valuable consideration, and left at his bankers for payment, and was paid by order of the plaintiff, and taken up.

Both these bills were forged by one Lee, who has been since hanged for forgery.

The defendant Neal acted innocently and bona fide, without the least privity or suspicion of the said forgeries or of either of them; and paid the whole value of those bills.

The jury found a verdict for the plaintiff; and assessed damages £80. and costs 40s. subject to the opinion of the Court upon this question—

"Whether the plaintiff, under the circumstances of the case, can recover back, from the defendant, the money he paid on the said bills, or either of them."

Lord Mansfield stopt [defendant's counsel] from going on; saying that this was one of those cases that could never be made plainer by argument.

It is an action upon the case, for money had and received to the plaintiff's use. In which action, the plaintiff cannot recover the money, unless it be against conscience in the defendant, to retain it; and great liberality is always allowed, in this sort of action.

But it can never be thought unconscientious in the defendant, to retain this money, when he has once received it upon a bill of exchange indorsed to him for a fair and valuable consideration, which he had bona fide paid, without the least privity or suspicion of any forgery.

Here was no fraud: no wrong. It was incumbent upon the plaintiff, to be satisfied "that the bill drawn upon him was the drawer's hand," before be accepted or paid it; but it was not incumbent upon the defendant, to inquire into it. Here was notice given by the defendant to the plaintiff of a bill drawn upon him: and he sends his servant to pay it and take it up. The other bill, he actually accepts; after

which acceptance, the defendant innocently and bona fide discounts it. The plaintiff lies by, for a considerable time after he has paid these bills; and then found out "that they were forged:" and the forger comes to be hanged. He made no objection to them, at the time of paying them. Whatever neglect there was, was on his side. The defendant had actual encouragement from the plaintiff himself, for negotiating the second bill, from the plaintiff's having without any scruple or hesitation paid the first: and he paid the whole value, bona fide. It is a misfortune which has happened without the defendant's fault or neglect. If there was no neglect in the plaintiff, yet there is no reason to throw off the loss from one innocent man upon another innocent man: but, in this case, if there was any fault or negligence in any one, it certainly was in the plaintiff, and not in the defendant.

PER CUR'. Rule—That the postea be delivered to the defendant.

NEAL v. COBURN.

(Supreme Judicial Court of Maine, 1898. 92 Me. 139, 42 Atl. 348, 69 Am. St. Rep. 495.)

Agreed statement.

Assumpsit to recover $250 paid by the plaintiffs to the defendant for a check which was found to be a forgery.

EMERY, J.[84] Haven was a depositor in the Bay State Trust Company, a bank in Boston. A written instrument purporting to be his check upon that bank, payable to Crew or order, was by Crew indorsed for value to Coburn, the defendant. Coburn indorsed it for value to Neal & Quimby. That firm indorsed it for value to Furbish, Butler & Oakes. The latter firm indorsed it for collection to the Phillips National Bank. The Phillips Bank indorsed it for collection to the Commonwealth Bank of Boston, which bank presented it for payment through the clearing house to the Bay State Trust Company, the bank upon which it was drawn. The Bay State Trust Company paid it as Haven's check, marked it "Paid," and charged the amount to Haven's account. Three days afterwards it was discovered that the drawer's (Haven's) signature was forged, and the paper was returned through the same channel to Neal & Quimby, the plaintiffs, who refunded the amount, and in their turn presented it to Coburn, the defendant, and demanded of him to refund the amount in his turn, which he refused to do; hence this action for money had and received to enforce such refunding.

It is conceded that Neal & Quimby cannot maintain this action unless the Bay State Trust Company could do so had all the intermediate indorsers refused to refund. The question therefore is: Assuming the good faith of all parties, who shall bear the loss in such case,—the

[84] The statement of facts is abridged.

first innocent indorser for value, or the bank which accepted the paper as genuine, and paid it as the check of its depositor?

Since a check belongs to that class of written instruments called "commercial paper," the question stated is not so much one of abstract justice in the particular case, as it is of what is the established or workable rule in this class of cases. Commercial paper has long been governed by special rules, which, while designed to insure justice, are also designed to insure the free and safe use of an indispensable commercial agency. The commercial world needs and seeks for the plain workable rule, rather than for the somewhat uncertain abstract right in each case. We think such a rule, decisive of this case, has been long and firmly established.

A check is in form and nature a species of bills of exchange, and is pro tanto governed by the same rules (Foster v. Paulk, 41 Me. 425); hence decisions as to bills of exchange upon this question are applicable to this case. In 1715, in an action by an indorsee against the acceptor of a bill of exchange, tried before Lord Raymond in the king's bench court, sitting at Guildhall, to hear commercial cases, it was held that the acceptance sufficiently proved the signature of the drawer. Evidence offered by the acceptor to affirmatively prove the bill to be a forgery was rejected, one of the reasons given being "the danger to negotiable notes." Jenys v. Fowler, 2 Strange, 931. In 1762, before Lord Mansfield, in the king's bench, then also sitting at Guildhall, was tried an action for money had and received to recover back money paid to an innocent indorsee of a bill of exchange by the drawee. The signature of the drawer was forged. Lord Mansfield stopped the defendant's counsel, saying the case could not be made plainer by argument, and ordered judgment for the defendant. Price v. Neal, 3 Burrows, 1355. In 1815 the question came before the common pleas also then sitting in London. The banker sought by an action for money had and received to recover back money paid by him to an innocent holder of a bill of exchange bearing a forged acceptance of a correspondent of the banker's. The plaintiff was nonsuited. Smith v. Mercer, 6 Taunt. 76. In 1882 the English "Bills of Exchange Act" was passed, "to codify the law relating to bills of exchange, cheques and promissory notes." In section 54 it was enacted that "the acceptor of a bill by accepting it is precluded from denying to a holder in due course the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill." 4 Eng. Ruling Cas. 159, 160. The rule stated by Lord Raymond, in 1715, seems to have become firmly established in that great commercial country.[85] * * *

The only allusion to the rule we have found in the published opinions

[85] Here follows an extended discussion of the American authorities, which are shown to be in accord with the English doctrine and to recognize that "a rule so well established and so firmly rooted in the jurisprudence of the country ought not to be overruled or disregarded."

of this court is in Belknap v. Davis, 19 Me. 457, in 1841, where, in an action by the holder against the acceptor of a bill of exchange, it was held that "the acceptance admits the signature of the drawer and the authority to draw." So far as it goes, this would seem to be in the same line with the decisions above cited and quoted from, and would seem to indicate that the rule so long and firmly upheld by those decisions is in harmony with the law of commercial paper in this state.

In some cases the courts have been led to inquire whether the condition of the holder had changed between the payment of the check and notice to him of the forgery, and to hold that, if the holder had suffered no loss by reason of the payment, he should refund the amount to the bank or drawer. The rule cited does not make any such distinction,—does not call for any inquiry into the condition of the holder. To do so is to abandon the rule, and with it all certainty. It would leave every person receiving payment on a check in complete uncertainty as to whether and when it was in fact finally paid. It would be a destructive blow to the usefulness of checks as an instrumentality of trade. It is also against the reason and equity of the rule as stated by the courts recognizing it, and hence is inconsistent with the rule. Wherever the rule is upheld, the doctrine of such cases must be rejected.

The reason usually given for the rule is that it is impracticable for the indorsee or holder of a bill of exchange or check to know or learn whether the signature of the drawer is genuine, and that the bank or other drawee has the best means of knowing or learning the fact; or, as sometimes expressed, the bank may be presumed to know the signature of its depositor, and the acceptor the signature of his business correspondent. Lord Mansfield, in Price v. Neal, supra, compared the equities. He said that the action for money had and received could not be maintained, unless it was against conscience in the defendant to retain it, and that it was not against conscience for an innocent holder to retain money paid to him by the drawee of a bill of exchange which he had in good faith paid value for. As between parties equally innocent, there seems to be no more equity in throwing off the loss from one to the other than in leaving it where it fell. In cases like these, however, where the loss fell in the regular course of business upon the bank, which could have known and should have known the forgery, it seems positively inequitable to throw off that loss upon an innocent man who had much less opportunity of knowing. As also said by Lord Mansfield, in Price v. Neal, if negligence is to be considered, it was as much, if not more, in the drawee or bank, as in the holder. But whatever the reason or equity of the rule, and however much it may be criticised by text writers and theorists, it has been so long established and so explicitly recognized by the courts in commercial communities that it should stand as the rule until modified by legislative action. It evidently has been found to be a workable rule, and its

plainness and certainty should not be obscured by fine judicial distinctions, confusing to the lay mind.

It has been suggested that this rule breaks against another rule of the law of commercial paper, viz. that the defendant, by indorsing the check, guarantied to every subsequent holder the genuineness of the signature of the drawer. But the bank upon which the check was drawn did not become a holder. It did not purchase the check. The bank paid it,—extinguished it. It was no longer a check, and could no longer have a holder as such. It had become merely a voucher. Skowhegan Bank v. Maxfield, 83 Me. 576, 22 Atl. 479.

The plaintiffs cite cases in which it was found that the bank was induced by the conduct of the holder to assume the check to be genuine without investigation. In other cases it was found that the holder knew or had reason to know of the forgery, or was put upon inquiry before taking the check. In these cases it was held that the holder was without the rule.

In this case, however, no such facts can be found. Haven, the supposed drawer, was occupying a summer cottage in the neighborhood. The check was written upon one of his blanks taken from his check book. The signature was so good an imitation that the bank accepted it. Crew, the forger, had previously received genuine checks from Haven. He was a boarder at the defendant's hotel or boarding house. While, after the event, the defendant now believes Crew to have been an impostor, nothing in the case shows that he so believed or had reason to so believe before the event. It is true, he was told by Crew that Haven desired the check to be held about three weeks before presentment; but that was no reason for suspecting the genuineness of the signature. It might have generated a doubt as to the solvency of Haven, but no more. While, perhaps, a banker would have hesitated to accept the check under the circumstances, we find in them nothing that would naturally have deterred a man like the plaintiff. In the New York case, Goddard v. Merchants' Bank, 4 N. Y. 149, the circumstances surrounding the transfer of the check from the forger to the first holder were even more suspicious than here, and were held to be insufficient to affect the holder.

We find the plaintiff was an innocent holder for value, and that the loss by the forgery fell, in the course of business, upon the bank. We hold that the defendant, though he has suffered no loss, is protected by the rule cited, and that, under the rule, the loss cannot be thrown off the bank upon him.

It is conceded that the defendant's verbal promise to refund, made under a misapprehension of the law, was without consideration, and hence not binding.

Plaintiffs nonsuit.[86]

[86] Accord: Germania Bank of Minneapolis v. Boutell (1895) 60 Minn. 189, 62 N. W. 327, 27 L. R. A. 635, 51 Am. St. Rep. 519, in which case Mitchell, J., said: "Many modern text writers, some of them of learning and ability, have

assailed the correctness of this doctrine, contending that the general rule as to money paid under mistake of fact should apply, and that the law ought to be that the bank, although at fault in not discovering the forgery of its customer's signature, can recover even from an innocent holder, if he will then be in no worse condition than if the bank had refused to pay the draft or check. See 2 Pars. Notes & B. 80; Morse, Banks, c. 33; Daniel, Neg. Inst. c. 42; also, Am. Law Rev. April, 1875, p. 411, and note to People's Bank v. Franklin Bank (1889) 17 Am. St. Rep. 889 (88 Tenn. 299, 12 S. W. 716, 6 L. R. A. 724). We shall not enter upon a consideration of the soundness of the argument against the doctrine, or as to which rule we would adopt if the question was res integra, because we do not feel at liberty to overrule or disregard a doctrine so well established and so firmly rooted in the commercial law of the country. If the rule is incorrect or works badly in practice, its change must be left to the legislature. We may say, however, that the opponents of the doctrine seem to have found no followers among the courts. We may also suggest that perhaps the courts themselves have given the opponents of the doctrine an unnecessary vantage ground, by frequently placing it exclusively on the narrow ground of actual negligence on part of the drawee in not discovering the forgery, because he was bound to know the signature of his own customer or correspondent. It is undoubtedly true that he is in better position than a stranger to know his customer's signature, and that men have a right to deal with checks and drafts on that assumption; but it does not seem to us that the doctrine rests entirely on this narrow basis of actual negligence on part of the drawee. The money of the commercial world is no longer coin. The exchanges of commerce are now made almost entirely by means of drafts and checks. It was largely in deference to this fact that the recovery of money paid on paper of this kind, to which the drawer's signature was forged, was made an exception to the general rule as to the recovery of money paid under a mistake of fact. In view of the use of this class of paper as money, it was considered that public policy required that, as between the drawee and good-faith holders, the drawee bank should be deemed the place of final settlement where all prior mistakes and forgeries should be corrected and settled once for all, and, if not then corrected, payment should be treated as final; that there must be a fixed and definite time and place to adjust and end these things as to innocent holders; and that that time and place should be the paying bank and the date of payment; and that, if not done then, the failure to do so must be deemed the constructive fault of the payee bank, which must take the consequences."

Section 62 of the Negotiable Instruments Law, providing that "the acceptor by accepting the instrument * * * admits (1) the existence of the drawer, the genuineness of his signature," is held to be an adoption of the rule of Price v. Neal, and to apply to a payment as well as to an acceptance by the drawer of a forged bill or check. National Bank of Rolla v. First Nat. Bank of Salem (1910) 141 Mo. App. 719, 125 S. W. 513; Cherokee Nat. Bank v. Union Trust Co. (1912) 33 Okl. 342, 125 Pac. 464 (overruling American Express Co. v. State Nat. Bk. [1911] 27 Okl. 824, 113 Pac. 711, 33 L. R. A. [N. S.] 188, involving a controversy arising prior to the adoption of the Negotiable Instruments Law).

Contra: First Nat. Bank v. Bank of Wyndmere (1906) 15 N. D. 299, 108 N. W. 546, 10 L. R. A. (N. S.) 49, 125 Am. St. Rep. 588 (apparently overlooking the Negotiable Instruments Law).

See also 4 Harvard Law Review, 297, "The Doctrine of Price v. Neal," a defense of the rule on the ground of purchase for value, by the late Dean Ames. This view is criticized in Keener, Quasi Contracts, 154 et seq., note. An excellent brief discussion of the subject is found in Woodward, Quasi Contracts, §§ 80–88.

Payment of Forged Paper by Supposed Maker.—"It seems to us, from the review of the authorities, that it is a rule of commercial law too firmly established to be shaken, being sustained by an unbroken line of authorities for more than a century, that the drawee of a bill of exchange is presumed to know the handwriting of the drawer, and a fortiori the maker of a negotiable note is presumed to know his own signature, and if the drawee accepts or pays the bill, or the maker pays the negotiable note, in the hands of a bona

FULLER v. SMITH.

(Nisi Prius, before Abbott, C. J., 1824. 1 Car. & P. 197.)

This was an action to recover the amount of a bill of exchange, which had been discounted by the plaintiffs for the defendants, and which afterwards turned out to be a forgery. The bill purported to be drawn by a person named Lunn, and accepted by George Norman & Son, payable at the plaintiffs', who were their bankers, and indorsed by Lunn and one Robert Simpson.

The forgery was clearly proved.

For the defendants, their clerk was examined; who swore that the defendants were the agents of Simpson, and had paid over the money to him before they had any notice of the forgery; on his cross-examination, he admitted that there was a running account between the defendants and Simpson, and entries in the books on both sides. These books were not produced.

ABBOTT, C. J. The only question of fact in this case is, whether the defendants paid over the money to Simpson before they had notice of the forgery; but I am of opinion, in point of law, that they are liable, whether they did so or not. With respect to the argument, that the plaintiffs ought to have known the handwriting of the acceptors, I am of opinion, that a banker is bound to know the handwriting of those who draw on him, as far as regards paying bills so drawn, but not when discounting a bill; for his attention is not called to it then. My opinion therefore is, that the plaintiffs in this case are entitled to a verdict. His lordship then requested the jury to say, whether they

fide holder, to which the drawer's or maker's name has been forged, he is bound by the act and cannot recover back the money so paid." Johnston v. Bank (1885) 27 W. Va. 359, 55 Am. Rep. 315.

Contra: Welch v. Goodwin (1877) 123 Mass. 71, 25 Am. Rep. 24.

RECOVERY OF MONEY PAID UPON A RAISED DRAFT OR CHECK.—It is well settled that a drawee innocently paying a negotiable instrument, the amount of which has been raised, can recover from the one to whom such amount has been paid. "The plaintiffs, as drawees of the bill, were only held to a knowledge of the signature of their correspondents, the drawers; by accepting and paying the bill they only vouched for the genuineness of such signatures, and were not held to a knowledge of the want of genuineness of any other part of the instrument." White v. Continental National Bank (1876) 64 N. Y. 316, 320, 21 Am. Rep. 612.

It has been suggested that this doctrine has been changed by section 62 of the Negotiable Instruments Law. Brannan, Negotiable Instruments Law (2d Ed.) 73, 74.

Culpable delay in giving notice of the alteration, if prejudicial to defendant, bars a recovery under the doctrine of change of position. Continental National Bank v. Metropolitan National Bank (1903) 107 Ill. App. 455, 461. See also Brown v. People's National Bank (1912) 170 Mich. 416, 136 N. W. 506, 40 L. R. A. (N. S.) 657.

In Crocker-Woolworth National Bank v. Nevada Bank (1903) 139 Cal. 564, 73 Pac. 456, 63 L. R. A. 245, 96 Am. St. Rep. 169, it was held that, even though plaintiff was not negligent nor guilty of unreasonable delay in notifying defendant, yet if defendant has changed its position no recovery can be had.

were satisfied of the fact of the money having been paid over before notice of the forgery; and they stated that they were not satisfied.

Verdict for the plaintiff.

ROUVANT v. SAN ANTONIO NAT. BANK.

(Supreme Court of Texas, 1885. 63 Tex. 610.)

Appeal from Bexar. Tried below before the Hon. Geo. H. Noonan.

William C. Igel brought this suit to recover $550 claimed to be a balance of a deposit still due him. The bank claimed that it had paid out the amount to appellant on a draft drawn in his favor by Igel, and set forth the draft. Igel claimed that the draft was a forgery. The bank then made Rouvant a party, claiming that the money had been paid to him by reason of his having received and indorsed the draft, etc., and prayed for judgment over against him, in the event Igel recovered against it. Rouvant claimed that the bank ought to have detected the forgery, etc.; that it delayed five or six weeks in the discovery of the forgery.

It seems that Rouvant was slightly acquainted with both Igel and a man by the name of Nichols; that the latter, late one evening, purchased of Rouvant a fine watch and diamond, and gave him the check in payment. He wrote and signed the check in Igel's name in the presence of Rouvant.

Upon the trial the court rendered judgment in favor of Igel against the bank, and in favor of the bank over against Rouvant, and the latter appealed.

WATTS, J. Com. App. A bank, in accepting and paying a draft drawn by a customer, is generally held to know the signature, and, if a forged draft is accepted and paid, the bank, as a general rule, will not be heard to assert a mistake as to the signature. City Bank v. National Bank, 45 Tex. 218; Price v. Neal, 3 Burr., 1354; Levy v. Bank of the United States, 1 Bin. (Pa.) 27.

To that general rule, however, there are certain exceptions. In National Bank of North America v. Bangs, 106 Mass. 444, 8 Am. Rep. 349, it was said: "But this responsibility, based upon presumption alone, is decisive only when the party receiving the money has in no way contributed to the success of the fraud, or to the mistake of fact under which the payment was made. If the loss can be traced to the fault or negligence of either party, it shall be fixed upon him." Gloucester Bank v. Salem Bank, 17 Mass. 33. In the absence of actual fault or negligence on the part of the drawee, his constructive fault in not knowing the signature of the drawer and detecting the forgery will not preclude his recovery from one who has received the money with knowledge of the forgery, or who took the check under circumstances of suspicion, without proper precautions, or whose conduct has been

such as to mislead the drawee, or to induce him to pay the check without the usual scrutiny or other precautions against mistake or fraud." See, also, Ellis v. Insurance & Trust Co., 4 Ohio St. 628, 64 Am. Dec. 610.

Here the check had not gone into circulation; it was drawn in favor of Rouvant and was indorsed and collected by him. At that time he was a responsible merchant in the city of San Antonio, and was known to the bank as such. When the check was presented, payable to and indorsed by him, the bank might well assume that there were no suspicious circumstances attending its execution, and no question as to the identity of the person who drew and signed it. At least his receiving and indorsing the check would have a tendency to mislead, and throw the officers of the bank off their guard, and cause them to accept and pay the check without subjecting it to the same scrutiny as if it had been indorsed and presented by a stranger.

If Rouvant, at the time the check was paid, had informed the bank of the suspicious circumstances under which it was made, or that he was not certain as to the identity of the drawer, doubtless the bank would have subjected the check to such critical examination as perhaps would have resulted in the detection of the forgery.

But a short time before this Rouvant had other transactions with Nichols, and had received from him a check upon the bank under his own signature. This he had presented and collected. Here he accepts a check for $550, executed by the same individual, but under a different signature, in the name of another person. Then can it be said that he was without fault in receiving, indorsing and collecting the check, and not informing the bank of the suspicious circumstances attending its execution? The loss is attributable to Rouvant's negligence, and upon him it should be fixed.

There is nothing in the objection that the delay in detecting the forgery precludes a recovery upon the part of the bank. None of the suspicious circumstances attending the execution of the check, though known to Rouvant, were known to the bank. There was nothing which would suggest to the bank a necessity for a more critical examination of the check. The forgery was discovered as soon as Igel examined his bank statement, and Rouvant was immediately thereafter informed of it.

Our conclusion is that there is no error in the judgment, and that it ought to be affirmed. Affirmed.[87]

[87] One who purchases negotiable paper from a stranger, without inquiry as to his identity or his right to the paper, is generally deemed guilty of such negligence as to entitle the drawee, who has honored such paper, to recover the amount thereof on discovering that it was a forgery. Ellis v. Ohio Life Insurance & Trust Co. (1855) 4 Ohio St. 628, 64 Am. Rep. 610; First Nat. Bank of Danvers v. First Nat. Bank of Salem (1890) 151 Mass. 280, 24 N. E. 44, 21 Am. St. Rep. 450. But a few decisions are contra. Commercial & Farmers' Nat. Bank of Baltimore v. First Nat. Bank of Baltimore (1868) 30 Md. 11, 96

CARPENTER v. NORTHBOROUGH NAT. BANK.

(Supreme Judicial Court of Massachusetts, 1877. 123 Mass. 66.)

Contract for money had and received. Trial before Gardner, J., who directed a verdict for the defendant.

Plaintiff executed his note for $2625 to the order of William Carpenter and delivered the same to one Jackson (counsel for Carpenter), in good faith, believing that Jackson was in this transaction acting for Carpenter. Jackson forged an indorsement in Carpenter's name, and himself indorsed the note over to defendant. Plaintiff, having paid defendant the note in ignorance of the forged indorsement, now sues to recover the sum paid.

LORD, J.[88] It is to be assumed, in testing the accuracy of the ruling of the learned judge who presided at the trial, that every fact upon which there was evidence for the jury was found most favorably for the plaintiffs.

It is then to be taken that the signature of William Carpenter was forged; that Jackson misappropriated the funds which he had procured upon the forged indorsement; that William Carpenter never had knowledge that such note had been taken in his name by Jackson, and that the note was originally obtained from the plaintiffs by fraud. It must also be taken to be settled that Jackson had no authority to indorse the name of William Carpenter, nor to assign the note for his own benefit; and that the acts done in the premises by Jackson were done in fraud of the rights of William Carpenter and of the plaintiffs. The question then is: Could the bank acquire any title, legal or equitable, to the note thus originally obtained by fraud and passed to it, not only in fraud of the rights of the maker, but by forgery as one of the means of accomplishing the fraud? Certainly it could not.

The question sometimes discussed, whether an acceptor is bound to know the genuineness of the signature of the drawer, does not arise. Nor is it necessary to consider to what extent the rule that every party to mercantile paper warrants the genuineness of every signature preceding his is to be applied. The plaintiffs were the makers of the note. It was payable only to the order of William Carpenter. Such order was never given. The plaintiffs therefore had never promised to pay

Am. Dec. 554; Pennington County Bank v. First State Bank of Moorhead (1910) 110 Minn. 263, 125 N. W. 119, 26 L. R. A. (N. S.) 849, 136 Am. St. Rep. 496.

The doctrine of Price v. Neal is not available to one who has paid no value. Title Guarantee & Trust Co. v. Haven (1909) 196 N. Y. 487, 493, 89 N. E. 1082, 1085, 25 L. R. A. (N. S.) 1308, 17 Ann. Cas. 1131.

[A holder of forged paper, who bought in good faith but was put on notice of facts calculated to arouse suspicion before presenting such paper to the drawee, cannot claim the benefit of the rule of Price v. Neal. First National Bank of Quincy v. Ricker (1874) 71 Ill. 439, 22 Am. Rep. 104.]

[88] A brief statement of facts has been substituted for that contained in the report.

the note to the bank. The bank could not have collected the note of the plaintiffs. When the plaintiffs paid the note to the bank, they paid it under the mistaken belief that the bank was the legal owner of the note, and had the right to collect it. It was, however, immediately discovered that the bank had no such right, and notice was at once given to it that the money thus paid by mistake would be reclaimed. It is common learning that ordinarily money paid by mistake to a person not authorized to receive it may be recovered back by the person paying. The cases in which it has been held that money thus paid cannot be recovered back have been exceptions to the rule, by reason of peculiar circumstances attending the particular payments.

The case most resembling this, but less favorable to the plaintiffs, is that of Canal Bank v. Bank of Albany, 1 Hill (N. Y.) 287. That was the case of the acceptor of a draft in favor of one Bentley; the name of Bentley was forged; subsequently the draft was indorsed by several innocent parties; and it came into the hands of the defendant bank for collection on account of another bank. Upon notice, the acceptor paid the draft to the defendant bank, which did not disclose the fact of its agency, which bank paid the amount over to its principal. Several weeks afterwards it was discovered that the name of Bentley was forged, too late to give notice to the indorsers, and after payment to the principal. It was held that the money could be recovered back of the defendant, notwithstanding the defendant had paid it over without notice, and notwithstanding that the indorsers could not be notified of the refusal or the failure of the acceptor to pay. It was said that, inasmuch as each subsequent indorser had paid for the draft under a mistake of fact, supposing it to be a genuine instead of a forged indorsement, he could recover the amount which he paid of the person to whom he paid it. It is not necessary for us to consider whether or not the rule thus laid down is sound, for the reasons, first, that no such question arises in the present aspect of the case, nor can it arise in this case, inasmuch as Abraham Jackson, the assumed forger of the indorsement, was the only indorser of the note against whom any claim could arise as indorser; and neither law nor equity could require that notice should be given to Jackson, to fix his liability upon a note which he had passed by his own forgery of an indorsement.

Inasmuch, therefore, as in this case there are none of the elements which have been held to bring a case within the exceptions to the general rule, an examination of the exceptions to the rule is unnecessary. This is simply the payment of a note to a party who has no legal and no equitable interest in the promise of the maker, whatever its rights may be as against Jackson, whose name is upon the same paper. The money having been paid by mistake to a person who had no right to demand it, the case is within the general rule, and the party paying may recover back the amount thus paid. This principle has been recognized in various decisions in this Commonwealth. See Merriam v. Wolcott, 3 Allen, 258, 80 Am. Dec. 69; Merchants' National Bank v. Na-

tional Eagle Bank, 101 Mass. 281, 100 Am. Dec. 120; Boylston National Bank v. Richardson, 101 Mass. 287; National Bank of North America v. Bangs, 106 Mass. 441, 8 Am. Rep. 349.

Verdict set aside.[89]

CITIZENS' BANK v. SCHWARZCHILD & SULTZBERGER CO.

(Supreme Court of Appeals of Virginia, 1909. 109 Va. 539, 64 S. E. 954, 23 L. R. A. [N. S.] 1092.)

Error to a judgment of the Court of Law and Chancery of the city of Norfolk in an action of assumpsit. Judgment for the defendant. Plaintiff assigns error.

BUCHANAN, J.[90] This is an action of assumpsit to recover money paid by the plaintiff under an alleged mistake of fact. Upon the issue of non assumpsit, the whole matter of law and fact was submitted to the court and a judgment rendered in favor of the defendant.

The material facts of the case are that on the 4th day of November, 1907, the defendants, the Schwarzschild & Sultzberger Company, a corporation, presented through the Norfolk National Bank of Norfolk for payment 15 coupons of $70 each, due on the 1st day of that month, taken from bonds held by the defendant. The bonds from which the coupons were taken were issued by the Jamestown Hotel Corporation and held by the defendant. The coupons were in the following words:

"$70.00.

"The Jamestown Hotel Corporation will pay to bearer, at the Citizens' Bank of Norfolk, Virginia, upon surrender of this coupon, seventy dollars in gold coin of the United States, on the first day of November, A. D., 1907, for one year's interest then due on its bond, No. 1.

"Chas. M. Barnett, Treasurer."

At the time the coupons were presented for payment at the plaintiff bank, the Jamestown Hotel Corporation, the maker thereof, had on deposit with the plaintiff the sum of $1,898.97; but on the 16th day of the preceding month an execution creditor of the hotel corporation whose judgment amounted to more than $14,000 caused a summons on suggestion to be served upon the plaintiff bank. When the summons was served upon the president of the plaintiff bank, he notified the other officers of the bank and the bookkeeper in charge of the account

[89] "The law is that, where a person has paid a negotiable paper to another on a forged indorsement, and the latter is innocent of the forgery, it is incumbent upon the person so paying to give notice of the forgery to the other person within a reasonable time after discovery of the fact; and he may lose his right of action for failure to give the notice, provided that his laches in this respect has subjected the other to loss. What is reasonable notice in such a case is generally a question for the jury." Yatesville Banking Co. v. Fourth Nat. Bank (1911) 10 Ga. App. 1, 72 S. E. 528.

[90] Portions of the opinion are omitted.

not to pay out any part thereof except by order of the court. Subsequently, and before the coupons in question were paid, the existing account of the hotel corporation which had been garnisheed in the hands of the plaintiff was transferred from the active ledger of the bank to the inactive department and marked "Corp.," and a new account opened with the hotel corporation, then in a failing condition and being operated under the direction of the court. When the coupons were presented for payment, the plaintiff bank had changed its clerks and a new clerk misread the word "Corp." for "coupons," and, thinking that the hotel corporation's account marked "Corp." was set apart for the payment of coupons, as the bank's habit was, paid them and charged them to that account. The mistake was not known until some two weeks afterwards, when the president of the plaintiff bank, in looking over the hotel corporation's account to ascertain the amount to its credit when the summons on suggestion was served upon him, discovered it. The plaintiff bank at once notified the defendant of the mistake, offered to return the coupons, and requested repayment, which after some months of correspondence was refused. The plaintiff bank was compelled to pay the whole $1,898.87 in its hands when garnisheed to the execution creditor, and will lose the $1,050 paid the defendant, unless it can recover it from the defendant, as the hotel corporation is insolvent.

The general rule is that money paid under a mistake of fact may be recovered; but the payment of a check or note by a bank upon which it is drawn or at which it is made payable under the mistaken belief that the drawer of the check or the maker of the note has sufficient funds to his credit to pay the check or note seems to be an exception to the general rule. The cases do not seem to be entirely agreed upon what principle this exception is based, but the great if not the overwhelming weight of authority maintains this exception to the general rule. Some place it upon the ground that there is no privity between the holder of the check or note and the bank; others upon the ground that, since the bank always has the means of knowing the state of the depositor's account by simply looking at its own books, the payment is not a payment by mistake within the meaning of the legal rule which permits a recovery; others still place their decision upon both grounds.

In Bank v. Hull, Dud. 259, one of the earliest American cases that we have found, the Supreme Court of South Carolina said that: "The question was one to be decided rather upon authority than general reasoning on the subject. No part of a commercial community is more interested in commercial usages than banks, and they cannot complain when they are required to strictly conform to them. They cannot always guard against fraud and imposition, but they may against mistakes depending on an inspection of their own books and accounts. * * * They accepted and paid the check presented by the defendant for and on account of Hepton, the drawer, whose money they kept for his convenience and accommodation. The privity of contract

was between them and their customer, Hepton, and not between them and one who may have happened in the course of dealing to present a check drawn by Hepton." * * *

In Manf. Nat. Bank v. Swift, 70 Md. 515, 17 Atl. 336, 14 Am. St. Rep. 381, it was said that, if any other rule prevailed, "no one could know when he could safely receive payment of a check." It is further said: "It is the duty of a bank to know the state of its depositor's account, and, if it makes a mistake, it must abide the consequences. The presentation of a check is a demand for payment. If it is paid, all the rights of the payee have been satisfied, and he is not entitled to ask any questions. It would forever destroy the character of a bank in all commercial circles if, when it was ready and willing to pay a check, it permitted the holder to inquire if the drawer had funds there to meet it. It is a matter with which he had no concern. In the absence of fraud on the part of the holder, the payment of a check by a bank is regarded as finality, and the fact that the drawer had no funds on deposit will not give the bank any remedy against the holder." * * *

Morse in his work on Banking says without qualification that, if a bank pays or accepts a check under the misconception that it has funds, it cannot recover from the holder, but it must look to the drawer alone for redress, except that under the clearing house rules a check paid through the clearing house may be returned within a certain time if the funds are found insufficient. 2 Morse on Banking, § 455. * * *

The coupons which were paid were payable to bearer at the plaintiff bank and possessed all the qualities and incidents of commercial paper. Arents v. Commonwealth, 18 Grat. 750, 766, 767, and cases cited. Their payment under the facts disclosed by the record would no more entitle the plaintiff bank to recover from the defendant than if the paper paid had been the Hotel Corporation's check, bill, or note. The same reasoning that applies in the one case is equally applicable in the other. If there be no privity in the one case, there is none in the other, and, if the misapprehension as to the state of the maker's account is not a mistake within the meaning of the legal rule which permits a recovery in the one case, it is equally not such a mistake in the other.

While the reasoning of the courts in the cases quoted from that there can be no recovery in a case like this is not altogether satisfactory, the conclusion reached by them is sustained by the great current of authority, and seems to be in accord with commercial usage.

We are of opinion, therefore, to affirm the judgment complained of. Affirmed.[91]

[91] "Where a bank receives in the ordinary course of business a check drawn upon it, presented by a bona fide holder, who is without notice of the fact that payment thereof has been stopped, and the bank pays the amount of the check to such holder, it cannot afterwards recover back the money as paid by mistake, on the ground that payment of the check had been countermanded by the drawer." Syllabus in National Bank of New Jersey v. Berrall (1904) 70 N. J. Law, 757, 58 Atl. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821, 1 Ann. Cas. 630.

SPRINGS v. HANOVER NAT. BANK.

(Supreme Court of New York, Appellate Division, First Department, 1911. 145 App. Div. 188, 130 N. Y. Supp. 87.)

McLAUGHLIN, J. Action to recover $39,000 paid by the plaintiffs to defendant under an alleged mistake of fact. At the conclusion of the trial the court directed a verdict for the plaintiffs, which, on motion of the defendant, he subsequently set aside and ordered a new trial. The plaintiffs appeal.

At the trial it appeared that the plaintiffs were engaged in business in the city of New York; that the defendant is a national bank located in such city; that the First National Bank of Decatur is also a national bank located at Decatur, Ala.; that Knight, Yancey & Co. was a firm which, prior to being adjudicated a bankrupt, carried on business in buying and selling cotton in the state of Alabama; that, prior to the transaction hereafter referred to, they had done business with the Bank of Decatur, and also with the plaintiffs; that in January, 1910, they inquired of the plaintiffs upon what terms they could handle cotton shipped to them at New York, to which the plaintiffs replied, giving terms. Nothing further, however, seems to have been done until March 29, 1910, when they telegraphed the plaintiffs that they were consigning cotton to them for delivery and asked advice as to shipping and drawing instructions. The plaintiffs replied by telegraph that they could ship as they thought best, and could draw for 85 per cent. of the value of the cotton, insuring until it was warehoused. On the same day Knight, Yancey & Co. telegraphed the plaintiffs: "Have shipped you today 600 bales care Independent Stores. Drew $39,000," —and then drew the following draft upon them:

"Knight, Yancey & Co., Cotton, Decatur, Ala., U. S. A.

"March 29, 1910, 19 * * * No. 4059.

"Pay to the order of W. B. Shackelford, Cashier, ($39,000) thirty-nine thousand dollars, for value received, and charge same to account of Knight, Yancey & Co.

"To Springs & Co., New York, N. Y."

This draft, on the same day, they presented for discount to the Decatur Bank, with what purported to be bills of lading and certificates of insurance for 600 bales of cotton attached. The draft was discounted by the Decatur Bank, and the amount of it, less the usual rate of exchange, credited to the account of Knight, Yancey & Co. The Decatur Bank indorsed the draft on the same day and sent it, with the papers attached, to the defendant for collection and credit, with a letter which gave the names of the drawees and the amount of the draft. The only reference to the papers attached was "P/A." The letter, with the inclosures as stated therein, was received by the defendant on the 31st of March. It indorsed upon the draft, "Hanover National Bank, paid March 31, 1910, New York," and then presented

it to the plaintiffs, who accepted the same and gave the defendant a check for the amount of it, retaining the draft and papers attached. The check was paid, and the amount of it credited by the Hanover Bank to the Decatur Bank, and the same was drawn out by or in the ordinary course of business on or before April 4th following. Some time thereafter, plaintiffs ascertained that the bills of lading were forgeries. They then demanded of the defendant the repayment of the $39,000, on the ground that the money had been paid under a mistake of fact. The demand was not complied with, and thereupon this action was brought to recover such sum.

Upon the foregoing facts I am clearly of the opinion that the plaintiffs were not entitled to recover. The draft was concededly drawn by Knight, Yancey & Co. The amount was correct, and, under the previous arrangement with Knight, Yancey & Co., the plaintiffs accepted and paid it. It was not a payment under a mistake of fact. Neither the Decatur Bank nor the Hanover Bank indorsed or in any way stamped the bills of lading which were drawn to the order of Knight, Yancey & Co. and indorsed by them in blank. The draft itself contained no reference to the bills of lading, and it is not claimed either the Decatur Bank or the defendant had any knowledge that the bills of lading were not genuine, or that either bank made any representation upon the subject to induce the plaintiffs to make the payment. The Decatur Bank received the draft in the usual course of business as a bank of discount and paid the full amount of it, less the exchange, to Knight, Yancey & Co., and it is not even suggested that any act of it or the defendant (except the indorsement of the draft in the usual course of business) operated to the prejudice of the plaintiffs or prevented them from making an earlier discovery of the forgeries. On the contrary, it appears that Knight, Yancey & Co. had arranged with the plaintiffs to accept the draft, and that they did accept it upon the representation of Knight, Yancey & Co. that the cotton mentioned in the bills of lading had been shipped to their firm for sale under the previous arrangement.

It may well be that the bills of lading gave some credit to the draft beyond what was created by the supposed pecuniary standing of Knight, Yancey & Co.; but they were not a part of the draft, were not referred to in it or in the acceptance, and, so far as the plaintiffs were concerned, they were nothing more or less than collateral security accompanying the draft. It was for the plaintiffs alone to determine, before they accepted the draft, the validity and value of such security. There was no obligation upon either the Decatur Bank or the defendant to do this. The Decatur Bank in discounting the draft, and the defendant in presenting it for payment, did not guarantee the genuineness of the bills of lading attached to it as collateral security.

The case in principle cannot be distinguished from Goetz v. Bank of Kansas City, 119 U. S. 551, 7 Sup. Ct. 318, 30 L. Ed. 515; Hoffman v. Bank of Milwaukee, 79 U. S. (12 Wall.) 181, 20 L. Ed. 366;

Robinson v. Reynolds, 2 Q. B. 196; Thiedemann v. Goldschmidt, 1 De Gex F. & J. 4; Woods v. Thiedemann, 1 Hurl. & C. 478; Leather v. Simpson, 11 L. R. Eq. 398; First National Bank of Detroit v. Burkham, 32 Mich. 328; Alton v. First National Bank of Webster, 157 Mass. 341, 32 N. E. 228, 18 L. R. A. 144, 34 Am. St. Rep. 285; Craig v. Sibbett, 15 Pa. 238; 2 Daniel, Negotiable Instruments, § 1734d.

In the Hoffman Case the bank had discounted drafts drawn by parties at Milwaukee on Hoffman & Co., commission merchants of Philadelphia, to which were attached bills of lading purporting to represent shipments of flour. Hoffman & Co. accepted and paid the drafts. The bills of lading turned out to be forgeries, and Hoffman & Co. sued the bank to recover the money paid, claiming such payment was made under a mistake of fact. It was held that the money paid was not a payment by mistake; the court saying: "Money paid under a mistake of facts, it is said, may be recovered back as having been paid without consideration; but the decisive answer to that suggestion, as applied to the case before the court, is that money paid, as in this case, by the acceptor of a bill of exchange to the payee of the same, or to a subsequent indorsee in discharge of his legal obligation as such, is not a payment by mistake, nor without consideration, unless it be shown that the instrument was fraudulent on its inception, or that the consideration was illegal, or that the facts and circumstances which impeached the transaction, as between the acceptor and the drawer, were known to the payee or subsequent indorsee at the time he became the holder of the instrument. * * * Attempt is made in argument to show that the plaintiffs accepted the bills of exchange upon the faith and security of the bills of lading attached to the same at the time the bills of exchange were discounted by the defendants. Suppose it was so, which is not satisfactorily proved, still it is not perceived that the concession, if made, would benefit the plaintiffs, as the bills of exchange are in the usual form and contain no reference whatever to the bills of lading, and it is not pretended that the defendants had any knowledge or intimation that the bills of lading were not genuine, nor is it pretended that they made any representation upon the subject to induce plaintiffs to contract any such liability."

In the Goetz Case, Goetz and another were engaged in the business of buying and selling hides at Milwaukee, Wis. One Dubois was a dealer in hides at Kansas City, Mo. Dubois telegraphed Goetz asking for what they could sell 400 hides and how much they would advance on a bill of lading of the shipment. Goetz replied giving the market price and stating they would pay a draft for two-thirds value, bill of lading attached. This was followed by a letter in which Goetz said they would sell all the hides Dubois might ship to the market at Milwaukee. On this understanding Dubois drew five drafts, to each of which bills of lading and invoices were attached. The bills of lading purported to be issued by the Chicago & Alton Railroad Company, stating it had received the hides, numbers and estimated weight, and

marked "to shipper's order, notify Goetz & Lenning, Milwaukee, Wis." The notice purported to give the weight of the hides and their price. The drafts were made payable to the cashier of the Bank of Kansas City and were cashed as drawn, the bank paying the full value, less rate of exchange, and the amount of the discount was passed to the credit of Dubois and checked out by him in the ordinary course of business. The drafts, after they were discounted, were sent by the bank to its correspondent, indorsed by it for collection, and the invoices were indorsed in the same way. The bills of lading were indorsed by Dubois. The signatures to the bills of lading proved to be forgeries, and Goetz refused to pay the fifth draft, upon which suit was brought; Goetz counterclaiming for the amount of the four previous drafts paid, alleging the same were paid by mistake of fact. It was held the bank was entitled to recover; the court saying: "Under these circumstances, it is not surprising that, when the drafts on the merchants in Milwaukee were presented for discount, the bank made no inquiry as to the genuineness of the bills of lading attached to them. A bank in discounting commercial paper does not guarantee the genuineness of a document attached to it as collateral security. Bills of lading attached to drafts drawn as in the present case are merely security for the payment of the drafts. The indorsement by the bank on the invoices accompanying some of the bills for collection created no responsibility on the part of the bank. It implied no guarantee that the bills of lading were genuine. It imported nothing more than that the goods which the bills of lading stated had been shipped were to be held for payment of the drafts if the drafts were not paid by the drawees, and that the bank transferred them only for that purpose. If the drafts should be paid, the drawees were to take the goods. To hold such indorsement to be a warranty would create great embarrassment in the use of bills of lading as collateral to commercial paper against which they are drawn."

It would make this opinion too long to quote from the other authorities; but it is sufficient to say they are equally as strong as the two quoted from, that money paid under facts similar to those here involved cannot be recovered. But see Hannay et al. v. Guaranty Trust Company of New York,[92] 187 Fed. 686, recently decided by the Circuit Court of the United States for the Southern District of New York.

The draft in question, as we have already seen, made no reference to the bills of lading. When the plaintiffs accepted it, they thereby

[92] In Hannay v. Guaranty Trust Co. (C. C. 1911) 187 Fed. 687, the draft which defendant accepted and later paid contained the provision, "Charge the same to the account of R. S. M. I. 100 bales of cotton," with what purported to be a bill of lading for the cotton attached thereto. The bill of lading proving to be a forgery, the court, following Guaranty Trust Co. v. Grotrian (1902) 114 Fed. 433, 52 C. C. A. 235, 57 L. R. A. 689, held that the draft was a conditional one, and the acceptance was conditional upon the validity of the bill of lading, and allowed a recovery of the sum paid, on the ground of mistake.

became obligated to pay according to the acceptance. The acceptance admitted the existence of Knight, Yancey & Co., the genuineness of their signatures, as well as their capacity and authority to draw the instrument. Negotiable Instruments Law (Consol. Laws, c. 38) § 112.

There is another view which it seems to me prevents plaintiffs from recovering. The defendant, in presenting the draft for payment, acted as the agent of the Decatur Bank, which was a bona fide holder for value. When the defendant received payment of the draft, it had no knowledge that the bills of lading attached were spurious, or that the bills did not represent actual cotton delivered. Having received the payment and paid the same over to the Decatur Bank before it had any knowledge that the bills of lading were spurious freed it from liability. Bank of America v. Waydell, 187 N. Y. 115, 79 N. E. 857; National Park Bank v. Seaboard Bank, 114 N. Y. 28, 20 N. E. 632, 11 Am. St. Rep. 612.

If the foregoing views be correct, then it follows that the court did not err in setting aside the verdict in favor of the plaintiffs and granting a new trial, because on the facts presented a verdict should have been directed for the defendant.

The order appealed from, therefore, is affirmed, with costs and disbursements. All concur.

SECTION 3.—MISTAKE OF LAW

HEWER v. BARTHOLOMEW.

(Court of Queen's Bench, 1598. Cro. Eliz. 614.)

This case is printed at page 11, supra.

BONNEL v. FOULKE.

(Court of King's Bench, 1657. 2 Sid. 4.)

This case is printed at page 13, supra.

BILBIE v. LUMLEY et al.

(Court of King's Bench, 1802. 2 East, 469.)

This was an action for money had and received, and upon other common counts, which was brought by an underwriter upon a policy of insurance in order to recover back £100. which he had paid upon the policy as for a loss by capture to the defendants the assured. The ground on which the action was endeavoured to be sustained was that

the money was paid under a mistake, the defendants not having at the time of the insurance effected disclosed to the underwriter (the present plaintiff) a material letter which had been before received by them relating to the time of sailing of the ship insured. It was not now denied that the letter was material to be disclosed; but the defence rested on now and at the trial was, that before the loss on the policy was adjusted, and the money paid by the present plaintiff, all the papers had been laid before the underwriters, and amongst others the letter in question: and therefore it was contended at the trial before Rook, J., at York, that the money having been paid with full knowledge, or with full means of knowledge of all the circumstances, could not now be recovered back again. On the other hand, it was insisted that it was sufficient to sustain the action that the money had been paid under a mistake of the law; the plaintiff not being apprized at the time of the payment that the concealment of the particular circumstance disclosed in the letter kept back was a defence to any action which might have been brought on the policy: and the learned judge being of that opinion, the plaintiff obtained a verdict.

A rule nisi was granted in the last term for setting aside the verdict and having a new trial; which was to have been supported now by Park for the defendants, and opposed by Wood for the plaintiff. But after the report was read, and the fact clearly ascertained that the material letter in question had been submitted to the examination of the underwriters before the adjustment,

Lord Ellenborough, C. J., asked the plaintiff's counsel whether he could state any case where if a party paid money to another voluntarily with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law? [No answer being given, his Lordship continued:] The case of Chatfield v. Paxton is the only one I ever heard of where Lord Kenyon at nisi prius intimated something of that sort. But when it was afterwards brought before this Court on a motion for a new trial, there were some other circumstances of fact relied on; and it was so doubtful at last on what precise ground the case turned that it was not reported. Every man must be taken to be cognizant of the law [93] otherwise there

[93] "His Lordship [Lord Chancellor King] said, That maxim of law, ignorantia juris non excusat, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases." Landsdown v. Landsdown (1730) Mosely, 364.

"Many of these maxims and ground principles get perversely and inaccurately expressed in this form of a presumption, as when the rule that ignorance of the law excuses no one is put in the form that every one is presumed to know the law." James Bradley Thayer, in 3 Harvard Law Review, 141, 165 "Presumptions and the Law of Evidence."

"There is no presumption in this country that every person knows the law; it would be contrary to common sense and reason if it were so." Maule, J., in Martindale v. Falkner (1846) 2 C. B. 719.

See the admirable criticism of the current phrase that "every one is presumed to know the law" in Keener, Quasi Contracts, 87 et seq.

is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case. In Lowrie v. Bourdieu, Dougl. 467, money paid under a mere mistake of the law was endeavoured to be recovered back, and there Buller, J., observed that ignorantia juris non excusat, &c.[94]

PER CURIAM. Rule absolute.

BRISBANE v. DACRES.

(Court of Common Pleas, 1813. 5 Taunt. 143.)

This was an act of assumpsit for money had and received, to which the defendant pleaded the general issue; and at the trial of the cause before Mansfield, C. J., at the first sittings within Hilary term, 1813, a verdict was found for the defendant, subject to the opinion of the court, on the following case.

In the year 1804, J. R. Dacres, Esq., the defendant's testator, was appointed commander-in-chief of his Majesty's ships and vessels on the Jamaica station: and before, and at the time of the sailing of H. M. S. the Arethusa, as hereinafter mentioned, she was under the command of Admiral Dacres, as such commander-in-chief; and while she continued under such his command, he in the month of April, 1808, ordered the plaintiff, (who was then captain or commander of the Arethusa, then lying off Jamaica,) to receive on board $700,000 belonging to government, and proceed with the same to Portsmouth. The plaintiff, in pursuance of, and under that order, received the dollars on board, and sailed to, and delivered them at, Portsmouth. The Arethusa, previous to her so sailing, also received on board $1,530,000 belonging to private individuals, which the plaintiff caused to be delivered at the Bank of England; for the use and benefit of the persons to whom they were consigned, in conformity to bills of lading signed by him for such delivery. The plaintiff, on the third day of November, 1808, received, through his agent, from the Bank of England, for the freight, of the $1,530,000 belonging to private individuals, the sum of £7358. 18s. 5d. The plaintiff also, through his agent, on the 16th day of March, 1809, received from his majesty's treasury, for the freight of the dollars belonging to government, the sum of £850. net, by virtue of the following warrant: "George Rex. Our will and pleasure is, that out of any money in your hands that may be imprested to you for this service, you do issue and pay, or cause to be issued and paid to our trusty and well-beloved Sir Charles Brisbane, or his assigns, the

[94] In Perrott v. Perrott (1811) 14 East, 423, one Mary Territt, having power to appoint £1000. by deed, executed the appointment, but subsequently canceled the deed of appointment in the mistaken belief that her will already executed would accomplish the same object. Lord Ellenborough, speaking for the court, said (page 439): "Mrs. Territt mistook either the contents of her will, which would be a mistake in fact, or its legal operation, which would be a mistake in law; and in either case we think the mistake annulled the cancellation."

sum of £850. without deduction and without account, which we are graciously pleased to allow him for freight of specie, conveyed by him on board our ship Arethusa, from Jamaica to Portsmouth: and this shall be as well to you for making the said payment, as to the commissioners for auditing our public accounts, as all others concerned in passing your said accounts, for allowing the same thereupon, a sufficient warrant. Given at St. James's, November 15, 1808. By his majesty's command, W. Broderick, Sp. Perceval, W. S. Bourne. To the paymaster general of guards, garrisons and land forces. Sir C. Brisbane £850., for freight on specie conveyed by him from Jamaica to Portsmouth." When an order is so given by an admiral commanding in chief to a captain, the latter acts under the command of the admiral, and not under a separate admiralty order; and the Arethusa was despatched on this service by Admiral Dacres, and during the whole of such service was acting under his orders.

The case then stated the usage of the navy, with respect to payment of freight on the carriage of bullion, previous to the year 1801, the discontinuance of it in that year, the correspondence between the Secretary of the Admiralty and the Secretary of the Treasury, which took place in 1807, and the orders of the Lords of the Admiralty made thereupon, in the same terms, as the same are detailed in the case of Montague v. Janverin, 4 Taunt. 446. The case further stated that, since the making of such order, the captains of his majesty's navy have constantly received the allowance therein mentioned for conveying public money; and according to the usage, had been required to pay, and had paid, as well one-third thereof, as also one-third of the freight for conveying private money, to the commander in chief, under whose command they were: and that in the present case the sum of £2500. was on the 22d of November, 1808, paid by the prize or navy agent of the plaintiff, (by whom the same had been previously received,) to the late Admiral Dacres, on account, and in part payment of one-third of the freight of the money so conveyed by the Arethusa, (that is to say,) the sum of £2479. 12s. 9d., for one-third of the freight of the private money, and the sum of £20. 7s. 3d., residue of the £2500. on account, and in part of one-third of the freight of the public money, so conveyed by that ship; which payment was made on the behalf, and account, and with the sanction of the plaintiff, with knowledge of the circumstances before stated, but under an idea of a right in the admiral to a third of such freight, on the ground of the beforementioned usage: and for the recovery of which sum of £2500., the present action was brought. The question for the opinion of the court was, whether under the circumstances stated the plaintiff was entitled to recover: if he was, the verdict was to be entered for the plaintiff, for such sum as the court should direct: and if not, the present verdict for the defendant was to stand.

Cur. adv. vult.

On this day the Judges of the Court delivered their opinions seriatim.

GIBBS, J., read the warrant. I read this particularly, because it has been contended that the terms of the warrant give the reward to the captains exclusively. I do not know that it is necessary for me to state the correspondence: The sum of it is this, that the lords of the treasury proposed to the lords of the admiralty that a certain sum should be paid to the commanders of ships of war which should carry dollars; the admiralty fell into this, and agreed that an allowance should be made to the commanders of such ships as shall carry treasure; the purpose of setting out these letters is, to show that the terms of them apply only to the captains commanding these ships, without any reference to the admirals. The case then states, that the payment was made on the behalf and account, and with the sanction of the plaintiff: but under an idea that he was bound to pay it under the practice. With respect to the freight of private dollars, we are all agreed; and as Captain Brisbane had no right to carry those dollars at all, and stipulated for and received a freight to which he had no right, and afterwards in pursuance of an understanding with Admiral Dacres, imparted a part to him in manner agreed on: we are all of opinion, that this carrying of the dollars was an illegal transaction, that the whole which followed was tainted with the same illegality, and that the money paid cannot be recovered at all, inasmuch as the captain could not lawfully employ the ship and crew, which ought to be employed in the service of his majesty, in carrying bullion for individuals. I think as to the £20., he cannot recover back the one third of that. We must take this payment to have been made under a demand of right; and I think that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he never can recover back the sum he has so voluntarily paid. It may be, that upon a further view he may form a different opinion of the law; and it may be his subsequent opinion may be the correct one. If we were to hold otherwise, I think many inconveniences may arise; there are many doubtful questions of law: when they arise, the defendant has an option, either to litigate the question, or to submit to the demand, and pay the money. I think, that by submitting to the demand, he that pays the money gives it to the person to whom he pays it, and makes it his, and closes the transaction between them. He who receives it has a right to consider it as his without dispute: he spends it in confidence that it is his; and it would be the most mischievous and unjust, if he who has acquiesced in the right by such voluntary payment, should be at liberty, at any time within the statute of limitations, to rip up the matter, and recover back the money. He who received it is not in the same condition: he has spent it in the confidence it was his, and perhaps has no means of repayment.

I am aware cases were cited at the bar, in which were dicta that

sums paid under a mistake of the law might be recovered back, though paid with a knowledge of the facts; but there are none of these cases which may not be supported on a much sounder ground. In the case of Farmer v. Arundel, 2 Bl. Rep. 825, De Grey, C. J., indeed says: "When money is paid by one man to another on a mistake either of fact, or of law, or by deceit, this action (of money had and received) will certainly lie." Now the case did not call for this proposition so generally expressed;[95] and I do think that doctrine, laid down so very widely and generally, where it is not called for by the circumstance of the case, is but little to be attended to; at least it is not entitled to the same weight in a case where the attention of the Court is not called to a distinction, as it is in a case where it is called to the distinction. Now in the very next case cited, Lowry v. Bourdieu, Doug. 471, which was so early as 21 Geo. 3, the distinction is taken. After the other Judges, Buller, J., says: I am clear that the plaintiff ought not to recover, for there is no fraud on the part of the underwriters; and in a case where there is no mistake of fact, or ignorance of fact, the money cannot be recovered back, for the rule applies, that ignorantia legis non excusat. This distinction was thus pointedly stated in the presence of Lord Mansfield, who heard it, and whose attention must be called to it; and he, at the end of the case, guards the world against the conclusion, that in no case can money, paid on an illegal transaction, be recovered back; for in case of extortion he says, it may. I mention this to show, that although Lord Mansfield spoke immediately after Buller, J., and must have heard and noticed his doctrine, he expresses no dissatisfaction with it. The next case is Bize v. Dickason, 1 T. R. 285, an action brought by an insurance-broker to recover back from the assignees of a bankrupt so much of a sum of money which the plaintiff had paid to the assignees for a debt due to the bankrupt, as the plaintiff might have deducted by way of set-off by reason of losses which had accrued before the bankruptcy upon policies effected by the plaintiff, and subscribed by the bankrupt.[96] It is most certain that the only

[95] In Farmer v. Arundel (1771) 2 Bl. Rep. 825, the court held that under the circumstances of that case it was not inequitable for defendant to retain the money; De Grey, C. J., saying: "Admitting, therefore, that this money could not have been demanded by the defendant (which it is not now necessary to decide), yet I am of opinion that it is an honest debt, and that the plaintiff, having once paid it, shall not, by this action, which is considered as an equitable action, recover it back again."

[96] In Bize v. Dickason (1786) 1 T. R. 285, it appeared that plaintiff owed the bankrupt at the time of his bankruptcy the sum of £1356. 0s. 3d. There was due to him from the bankrupt (who was an underwriter) as losses on certain insurance policies taken out by plaintiff in his own name for certain foreign correspondents the sum of £661. 9s. 10d. Plaintiff paid defendants, the assignees of the bankrupt the amount of his own indebtedness to the bankrupt, to wit, £1356. 0s. 3d. The plaintiff, who was a del credere agent, paid the amount of the losses on the insurance policies to his foreign correspondents. He then notified the defendants that he had paid them the said sum of £1356. 0s. 3d. under a mistaken idea without deducting the said £661. 9s. 10d., and

question brought under the consideration of the Court in that case was, whether the right of the broker, who had a del credere commission, to make the deduction, ranged itself under the case of Grove v. Dubois, 1 T. R. 112; and Mingay declined all argument, and give up the case. It was taken for granted without argument, that if the plaintiff would have had a right to make the deduction before payment, he might recover back the amount after payment. Lord Mansfield mentioned in his judgment many cases where money paid could not be recovered back although, if it had not been paid, it could not have been enforced; and he concludes by saying, that where money is paid under a mistake, which there was no ground to claim in conscience, it may be recovered back.

Mistake may be a mistake of law or of fact; but I cannot think Lord Mansfield said "mistake of law;" for Lord Mansfield had, six years before, in Lowry v. Bourdieu, heard it said, "money paid in ignorance of the law could not be recovered back," and had not dissented from the doctrine; and Buller, J., sate by him, who had expressly stated the distinction six years before in Lowry v. Bourdieu, and would not have sate by and heard the contrary stated without noticing it. Lord Mansfield's dictum is, that money paid by mistake, which could not be claimed in conscience, might be recovered back. I have, however, considerable difficulty in saying that there was any thing unconscientious in Admiral Dacres, in requiring this money to be paid to him, or receiving it when it was paid. Ever since the date of this correspondence, it had been the practice of the admirals to receive this; their right to it had never been questioned at the time when Admiral Dacres received this sum. Chatfield v. Paxton, B. R. 39 Geo. III, Mich. term. A bill had been paid by the plaintiff to the defendant's house in India, which was dishonoured in consequence of the defendant's having been guilty of laches which they did not disclose. The bill was protested and sent back to England; and the plaintiff was called on in England to pay it, certainly under an ignorance of the circumstances which had taken place in India. In consequence of this demand he accepted another bill; and before that bill was mature, a correspondence took place, which, as

brought action for money had and received for the latter sum. Held for plaintiff. The opinion delivered by Lord Mansfield is as follows: "The rule had always been, that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back again in an action for money had and received. So where a man has paid a debt, which would otherwise have been barred by the Statute of Limitations; or a debt contracted during his infancy, which in justice he ought to discharge, though the law would not have compelled the payment, yet the money being paid, it will not oblige the payee to refund it. But where money is paid under a mistake, which there is no ground to claim in conscience, the party may recover it back again by this kind of action."

In Franklin Bank v. Raymond (1829) 3 Wend. (N. Y.) 69, 73, on similar facts, it was held for the defendant, the court saying that, "to retain the money paid under these circumstances cannot be against conscience."

I contended, informed the plaintiff of all the circumstances attending the presenting of the first bill, and showed that Chatfield need not have accepted that second bill, and therefore that he need not have paid it; but he did pay it; and I for the defendant, contended, that either he ought, relying upon that defence, not to have paid it, or that having paid it he could not recover it back. Lord Kenyon at nisi prius commented on the letters: one said that the plaintiff was going to Bengal, where he hoped to gain a more full knowledge of the case. Lord Kenyon stated, that although the letters might amount to evidence of knowledge of the facts, they did not show an acquiescence in the loss of the money; and he thought a payment made under an ignorance of the law, would enable the plaintiff to recover back the money. He also added, that perhaps the party, though he knew both the law and the fact, yet, if he paid both under fear of arrest, for want of evidence to maintain his case, might afterwards recover it. To that doctrine I acceded, and still accede; but I moved for a new trial, on the misdirection of the Judge upon the first point, that money paid under ignorance of the law, with knowledge of the facts, might be recovered back; whereas, I said, if it had been paid with ignorance of the facts, but with knowledge of the law, it might be recovered. On the discussion of the rule nisi, not one of the Court espoused the doctrine of Lord Kenyon, or attempted to support it, but they recurred to the letters, and found those passages in them, from whence they inferred that the plaintiff was ignorant of a part of the facts: it was a very complicated case. Lord Kenyon, at that time, and Ashhurst, J., put it wholly on the ground of the plaintiff's not having had a knowledge of the facts. They go on to say, that where a man pays without knowledge, but only with a blind suspicion of the facts, still he may recover. Grose, J., doubts whether the plaintiff was not acquainted with the facts before he paid the bill; but he tacitly admits that if the plaintiff did know the facts then the money could not be recovered: so that he must be considered as being clearly of opinion, that if it was paid with a knowledge of all the facts, could not be recovered back: and Lawrence, J., doubted, not whether the plaintiff had knowledge of the law, but of the facts; for that although the plaintiff seemed to have been apprized, before he paid the bill, of the general outline of his defence, he was not then so conversant with the particular facts now appearing, as to have been able to resist the demand then made on him, if an action had been brought.

Here then is, I may say, the ultimate opinion of Lord Kenyon; for he first directed the jury it might be recovered back if paid with a knowledge of the facts, but without knowledge of the law, which opinion he wholly afterwards abandons. Among all the practitioners of the Court of King's Bench, where questions of this sort very frequently arise on insurance transactions, we were universally of this opinion, that where the money was paid with a knowledge of the facts,

it could not be recovered back. One underwriter chose to pay, rather than resist; another resisted and succeeded: in all similar cases it would be very easy to say, "I paid this without a knowledge of the law, and therefore may recover it back." Our only question, then, in all cases was, whether the facts were known: this was the universal practice, till Bilbie v. Lumley, 2 East, 469, occurred: that case was tried at York, before Rooke, J., who ruled differently. After the report was read, Lord Ellenborough asked Wood, B., then of counsel for the plaintiff, whether he could find any case which would support it; and he cited none. Lord Ellenborough said he never heard of any, except Chatfield v. Paxton, and that it was so doubtful at last upon what precise ground that case turned, that it was not reported; and the rule was made absolute for a new trial. Now this was a direct decision upon the point, certainly without argument; but the counsel, whose learning we all know, and who was never forward to give up a case which he thought he could support, abandoned it. In Herbert v. Champion, 1 Camp. 134, a distinction is clearly taken between an adjustment on a policy, and a payment on the adjustment; and Lord Ellenborough says, that if the money had been paid, it cannot be recovered back without proof of fraud. I am, therefore, of opinion this money cannot be recovered back. I think on principle that money which is paid to a man who claims it as his right, with a knowledge of all the facts, cannot be recovered back. I think it on principle, and I think the weight of the authorities is so, and I think the dicta that go beyond it are not supported or called for by the facts of the cases. Bilbie v. Lumley, I think, is a decision to that effect; and for these reasons, I am of opinion, the plaintiff is not entitled to recover.

CHAMBRE, J. I concur in thinking the money is not recoverable on the payment of the private freight, whether the carriage of the treasure be considered as a legal, or as an illegal transaction. If illegal, the money clearly cannot be recovered; if it be legal, the right to carry it must arise from the permission of government; and as the practice has been uniform for the admiral to receive his third part, we must take it that it is a part of the practice, and that the whole practice has had that assent of the government. As to the freight for the carriage of the public property, I think it stands on a different ground, and that the action is maintainable. The plaintiff had a right to it, and the defendant in conscience ought not to retain it. The rule is, that when he cannot, in conscience, retain it, he must refund it, if there is nothing illegal in the transaction: the case is different where there is an illegality. I do not think the case of Chatfield v. Paxton applies much in this view of the question. I never heard of the several parts of that case till now: but I think there are sufficient authorities to say this person has paid this money in his own wrong, and that it may be recovered back. In the case of Bilbie v. Lumley, there was a letter said to have been concealed, that ought to have been disclosed: this letter

was shown to the underwriters; and they, after reading it, thought fit to pay the money. Now there the maxim volenti non fit injuria applies: in that case all argument was prevented by a question put by the Court to the counsel. I am not aware of any particular danger in extending the law in cases of this sort, for they are for the furtherance of justice; neither do I see the application of the maxim used by Buller, J., in the case of Lowry v. Bourdieu, and cited by the Court in Bilbie v. Lumley, ignorantia juris non excusat, it applies only to cases of delinquency, where an excuse is to be made.

I have searched far, to see if I could find any instance of similar application of this maxim. I have a very large collection of maxims, but can find no instance in which this has been so applied. I cannot see how it applies here. In Lowry v. Bourdieu, the decision turned on the transaction being illegal, and it being illegal, the maxim applied, in pari delicto potior est conditio defendentis. Moses v. Macfarlane, 1 Bl. 219, and a number of subsequent cases decide, that where the plaintiff is entitled, ex æquo et bono, to recover, he may recover. In Farmer v. Arundel the opinion of De Grey is not a mere dictum, it is part of the argument, it is a main part of the argument. He there says, where money is paid under a mistake either of fact, or of law, or by deceit, this action will certainly lie. It seems to me a most dangerous doctrine, that a man getting possession of money, to any extent, in consequence of another party's ignorance of the law, cannot be called on to repay it. Suppose an administrator pays money per capita in misapplication of the effects of the intestate, shall it be said that he cannot recover it back?[97] It is said, that may be remedied in equity: this is an equitable action; and it would be of bad effect, if it should not prevail in like cases. In the case of Bize v. Dickason, Lord Mansfield held, that if a person has paid that which, in conscience, he ought, but the payment of which could not be compelled, it shall not be recovered back in an action for money had and received; but that where a man has paid money under a mistake, which he was neither bound in law, nor called on in conscience to pay, he may recover it back.

Now the case against the plaintiff is not so strong as it has been stated. I do not find in the case that any demand was ever made of him, or any question mooted, upon which he thought it better to submit, than to litigate the point. No option ever presented itself to him, and the maxim volenti non fit injuria does not apply. It appears to me that the justice of the case, with respect to the freight of the public treasure, is entirely with the plaintiff. As to the insurance cases that

[97] It is generally held that there can be no recovery of a legacy paid under mistake of law. Rogers v. Ingham (1876) 3 Chd. 351; Phillips' Ex'r v. McConica (1898) 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753; Scott v. Ford (1904) 45 Or. 531, 78 Pac. 742, 80 Pac. 899, 68 L. R. A. 469.

Contra: Northrop's Executors v. Graves (1849) 19 Conn. 548, 50 Am. Dec. 264.

have been cited, a great deal of fabricated law has been newly created within a few years; and the Courts have to decide on difficult and complex cases: but those doctrines must not be carried into the general law, but confined to the occasions which gave rise to them. I therefore think the plaintiff may recover as to the £20.

HEATH, J. There are two questions in this case. As to the question whether a payment, made under ignorance of the law without ignorance of the facts, will enable a man to recover his money back again, it is very difficult to say that there is any evidence of ignorance of the law here; an officer is sent on a profitable service, the admirals are in the habit of receiving a proportion of the officer's recompense, and it is very likely the officer should acquiesce in the demand. He might not like to contest the point with his superior officer. I think a payment made with knowledge that a request would be made is not distinguishable from the case of an actual demand. Now if money be received without expressing the use to which it is paid, it is received to the use of the payer; but when it is expressed to what use it is paid, that presumption does not arise: here the use was distinctly expressed. Moses v. Macfarlane has properly been questioned in many cases, and particularly by Eyre, C. J., and in Marriot v. Hampton, 7 T. R. 269, in which the plaintiff sought to recover back the amount of a debt recovered by law from him, whereas he had paid it before but it was held that the action was not maintainable. That was the case of judicium redditum in invitum: but this is a stronger case; for the plaintiff is a judge in his own cause, and decides against himself; and he cannot be heard to repeal his own judgment. Lord Eldon, Chancellor, in 7 Ves. 23, Bromley v. Holland, approves Lord Kenyon's doctrine, and calls it a sound principle, that a payment voluntarily made is not to be recovered back. The plaintiff ought not to recover.

MANSFIELD, C. J. I think in this case, the plaintiff ought not to recover. If it was against his conscience to retain this money, according to the doctrine of Lord Kenyon, an action might be maintained to recover it back: but I do not see how the retaining this is against his conscience; for how is it claimed? Before 1801 the captains always paid freight to themselves both for private and public treasure, before they paid over the residue of the dollars. At that time it was thought proper that that practice should be discontinued so far as related to the freight of the public treasure; but, in order to make captains more attentive to their charge, the treasury and admiralty thought it would be proper to make them an allowance, and that was to be paid to the captain by a warrant from the treasury; but so it had before been, when the captain deducted it, that was paid to the captain, and before that a practice had prevailed, one knows not how, but probably by some analogy to the practice of prize-money, that the flag-officer, when only one, should be entitled to one-third; when

more than one flag-officer, they shared it in certain proportions. In the order which was made for letting them thenceforth be paid by a warrant, instead of deducting the freight themselves, nothing is said about any allowance to be made to admirals; the order is quite silent on the subject of what the captain shall do with the freight when he has it, but the officers of the navy all thinking that they were to proceed as they before did, go on, the one to pay, and the other to receive as they had done before this alteration, and the admirals receive their share as before; the admiral and captain each thinking that their right continued as before, the admiral, that he has his accustomed right, the captain, that it is his duty to pay the accustomed share, the one pays, and the other receives it. This then being so, the admiral doing no more than all admirals do, is it against his conscience for him to retain it? I find nothing contrary to æquum et bonum, to bring it within the case of Moses v. Macfarlane, in his retaining it. So far from its being contrary to æquum et bonum, I think it would be most contrary to æquum et bonum, if he were obliged to repay it back. For see how it is! If the sum be large, it probably alters the habits of his life, he increases his expenses, he has spent it over and over again; perhaps he cannot repay it at all, or not without great distress: is he then five years and eleven months after, to be called on to repay it.[98]

The case of Farmer v. Arundel, and De Grey's maxim there, is cited; it certainly is very hard upon a Judge, if a rule which he generally lays downs is to be taken up, and carried to its full extent. This is sometimes done by counsel, who have nothing else to rely on; but great caution ought to be used by the court in extending such maxims to cases which the Judge who uttered them never had in contemplation. If such is the use to be made of them, I ought to be very cautious how I lay down general maxims from this bench. In the case of Bize v. Dickason, the money ought conscientiously to have been repaid. There is no other case cited as an authority for the proposition. The maxim volenti non fit injuria, applies most strongly to this case. Lowry v. Bourdieu was the case of a gaming policy. A bond had been given for securing the money lent, which was the only interest intended to be insured; if the plaintiff could have recovered on the policy, he might have recovered the money twice. The insurance was on goods; and he had no interest whatsoever in those goods, otherwise than that, if the goods arrived, the owner of them would be the better able to pay his debt. The last case is Bilbie v. Lumley. Certainly it was not argued, but it is a most positive deci-

[98] In Skyring v. Greenwood (1825) 4 Barn. & Cr. 281, it was held that "money paid under mistake of fact could not be recovered back if the recipient had in the meantime altered his mode of living to what he supposed to be his income and spent the money thus received." But see Standish v. Ross (1849) 3 Exch. R. 527. See also 20 Harvard Law Rev. 212, note.

sion; and the counsel was certainly a most experienced advocate, and not disposed to abandon tenable points. My Brother Chambre put the case of an administrator paying away the assets in an undue course of administration. I know not that he could recover back money so paid: certainly, if he could, it could be only under the principle of æquum et bonum. There being, therefore, no case which has been argued by counsel, wherein the distinction has been taken, and in which this doctrine has been held, and as we do not feel ourselves called upon to overrule so express an authority as Bilbie v. Lumley, I am of opinion that the defendant is entitled to retain this money. We hear nothing of what is become of the assets in this case: perhaps they may be applied among the next of kin, and dissipated; but what would be the situation of the parties, if, at the end of five years and eleven months, they could be called on to refund in such a case? I am, therefore, of opinion, that there ought to be judgment for the defendant.

Judgment for the defendant.[99]

SCOTT v. BOARD OF TRUSTEES OF TOWN OF NEW CASTLE.

(Court of Appeals of Kentucky, 1909. 132 Ky. 616, 116 S. W. 788, 21 L. R. A. [N. S.] 112.)

SETTLE, C. J.[1] This action was brought by appellant to recover of appellees, composing the board of trustees of the town of New Castle, $353.40 with interest from June 5th, 1907, upon the ground that the previous payment by him to the board of that sum had been made by mistake and without consideration.

The plaintiff was the owner of a saloon in the town of New Castle in Henry county. In June, 1906, the county of Henry went dry and in July of that year the town officials refused the plaintiff a renewal of his liquor license on the ground that the action of the county in voting against the sale of liquor applied to the town of New Castle, although shortly before the county vote on the subject the town had voted in favor of the sale of liquor. Upon the refusal of the county officials to issue to plaintiff a liquor license the plaintiff petitioned for and obtained from the Circuit Court a mandamus compelling the defendant to issue to the plaintiff such a license. Pursuant to the order of the Court a license was issued to the plaintiff he paying the regular license

[99] The great weight of American authority is in accord with the ruling of Gibbs, J., in the principal case. A leading American case is Clarke v. Dutcher (1824) 9 Cow. (N. Y.) 674, where, however, the court finally decided that plaintiff's action was barred by reason of the running of statute of limitations. An exhaustive review of the authorities is found in Scott v. Ford (1904) 45 Or. 531, 78 Pac. 742, 80 Pac. 899, 68 L. R. A. 469.

[1] The statement of facts contained in the opening paragraphs of the opinion of Settle, C. J., has been condensed and a portion of the opinion proper has been omitted.

fee of $500.00 which entitled him to the privilege of selling liquor for one year. The defendants promptly appealed from the judgment of the Circuit Court and the Court of Appeals reversed such judgment and decided that the vote taken in the county of Henry in June, 1906, also made the town of New Castle dry and put it out of defendants' power to grant the license which they had issued to plaintiff. Plaintiff thereupon closed his saloon, having operated under the license granted him for the period of 107 days.

The present action was brought to recover so much of the license fee as covered the remainder of the year; the plaintiff contending that such money was unearned by the town of New Castle and was paid by him to its board of trustees without consideration and under a mistake of law. Appellees filed a general demurrer to the petition, which the court sustained and dismissed the action; hence this appeal.

So the question presented by the appeal is: Can appellant, the consideration having failed, recover the money claimed, which, though paid with knowledge of the facts, he nevertheless parted with under a patent mistake of law? When appellees refused appellant a license to continue for another year the sale of spirituous and malt liquors in New Castle, there was ample ground for an honest difference of opinion as to the effect of the county election in favor of local option upon the election of the previous year held in the town of New Castle alone, which had gone against local option. As able lawyers throughout the state were then disagreeing upon the same question, it is not surprising that appellant and appellees did so. Appellant in good faith believed that, as the people of the town of New Castle had in the previous year voted to permit the sale of liquors within its corporate limits, another vote upon local option could not legally be taken therein for three years, and therefore that the later election held throughout the county of Henry and which resulted against the sale of liquors had no effect upon the election in the town. On the other hand, appellees with equal good faith took the opposite view, and acted upon it in refusing appellant license. As a law-abiding citizen appellant took the matter to the circuit court of the county for adjudication, and the judgment of that court sustained his view of the law. Appellees, while acquiescing in the judgment to the extent of granting appellant license as it directed, were nevertheless unwilling to accept it, so they prosecuted an appeal to this court for a final adjudication which resulted in favor of their contention. In the meantime they had the right, pending the appeal, to supersede the judgment of the circuit court, and thereby prevent the issual to appellant of license. This they did not do; but, instead, delivered him the license, for which he paid in the honest belief that the judgment of the circuit court in his favor would be affirmed by the Court of Appeals. In this he was mistaken, as he was in believing appellees had authority to grant him license, and as was the circuit court in rendering the judgment appealed from. The question at issue was so involved in doubt as to render its solution practically im-

possible without a construction from the highest court of the state, which, if not satisfactory to those interested, would at least be final and conclusive. Obviously, in paying appellees the amount necessary to entitle him to the license demanded, appellant acted under a mistake of law; indeed, we may say that it would be difficult to imagine a payment of money under a clearer and more palpable mistake of law. And this court has more than once declared that where money is paid under a clear mistake of law or fact, which in equity and good conscience should not be retained by the party receiving it, a recovery will be allowed. Brands, etc., v. City of Louisville, 111 Ky. 60, 63 S. W. 2, 23 Ky. Law Rep. 442; Underwood v. Brockman, 4 Dana (34 Ky.) 318, 29 Am. Dec. 407; Ray v. Bank (3 B. Mon.) (42 Ky.) 514, 39 Am. Dec. 479.

The following admirable statement of this principle may be found in Northrop v. Graves, 19 Conn. 548, 50 Am. Dec. 264, quoted with approval in City of Louisville v. Anderson, etc., 79 Ky. 340, 42 Am. Rep. 220: "We mean to distinctly assert that when money is paid by one under a mistake of his rights and duties, and which he was under no legal or moral obligation to pay, and which the recipient had no right in good conscience to retain, it may be recovered back whether such mistake be one of fact or law; and this, we insist, may be done both upon the principles of Christian morals and the common law." We are unable to see upon what principle of good morals or law appellees can justify their retention of the amount in controversy, or legally compel appellant to lose it. In the case of Bruner & Bloom v. Clay City, 100 Ky. 567, 38 S. W. 1062, 18 Ky. Law Rep. 1008, it was held that, where one was required to pay more for a liquor license than was authorized by the city charter, the payment was not a voluntary one, and he might recover from the city the amount paid in excess of the charter requirement. In principle the case supra does not differ from the case at bar. In each case the amount paid to the city for a license was more than it was entitled to receive. In the one case the amount paid was in excess of what the charter allowed; in the other the payment was not above the amount fixed by law, but it was in excess of what the city was entitled to retain, because the privilege of selling liquors which the license conferred failed by as much as the alleged excess to cover the period for which it was issued.

We do not agree with counsel for appellees that a license such as appellant paid is a mere tax, which, when voluntarily paid, cannot be recovered. It is true that a tax, when voluntarily paid, cannot be recovered, though illegally collected. L. & N. R. R. Co. v. Commonwealth, 89 Ky. 531, 12 S. W. 1064, 11 Ky. Law Rep. 734. But this rule is based upon considerations of public policy, and because the law provides ample means of correcting an illegal assessment before the process of collecting the tax begins; but a license such as appellant paid is on a different footing. * * * We are therefore of opinion that the petition states a cause of action.

Wherefore the judgment is reversed and cause remanded, with directions to overrule the demurrer, and for further proceedings consistent with the opinion.[2]

METZGER v. GREINER.

(Circuit Court of Columbiana County, Ohio, 1906. 9 Ohio Cir. Ct. R. [N. S.] 364.)

Appeal from common pleas court.

The controversy in this action is between Byron S. Ambler, as trustee of Joseph Koll under the insolvent laws of the state, by his cross-petition and the answer thereto of John S. McNutt, receiver of Greiner & Son, who will hereafter be denominated plaintiff and defendant.

Joseph Koll had borrowed from Greiner & Son, who were bankers at Salem, Ohio, about $6,000. To secure the loan Koll deposited a number of shares of the capital stock of the Victor Stove Company a corporation organized under the laws of Ohio. Subsequently Koll made a general assignment for the benefit of his creditors under the insolvent laws of Ohio, and plaintiff became trustee, succeeding the assignee appointed in the deed of assignment. Difficulties arose in the firm of Greiner & Son, which was a partnership, and John S. McNutt was appointed receiver to settle up the affairs of the partnership. Koll not having paid the loan, the stock deposited with Greiner & Son as security was sold and the proceeds applied upon the claim due the bank, which was about one-third of the amount then due.

After the appropriation of the proceeds of the sale of the stock to the claim of Greiner & Son, plaintiff declared a dividend in favor of the creditors of Koll, and paid the dividend in favor of Greiner & Son upon the full amount of the loan of $6,000 to the defendant, as

[2] In Georgia and South Carolina recovery has been allowed for a payment made under mistake of law, but not for one made under ignorance of law. Lawrence v. Beaubien (1831) 2 Bailey (S. C.) 623, 23 Am. Dec. 155; Culbreath v. Culbreath (1849) 7 Ga. 64, 50 Am. Dec. 375. In the latter case Nisbet, J., explained the distinction as follows: "There is a clear and practical distinction between ignorance and mistake of the law. * * * Ignorance implies passiveness; mistake implies action, ignorance does not pretend to know, but mistake assumes to know. Ignorance may be the result of laches, which is criminal; mistake argues diligence, which is commendable. Mere ignorance is no mistake, but a mistake always involves ignorance, yet not that alone. * * * The distinction is a practical one, in this, that mere ignorance of the law is not susceptible of proof. Proof cannot reach the conviction of the mind undeveloped in action; whereas a mistake of the law developed in overt acts, is capable of proof, like other facts." This distinction has been preserved in the Georgia code. Arnold v. Georgia R. & Banking Co. (1873) 50 Ga. 304; Whitehurst v. Mason (1913) 140 Ga. 148, 78 S. E. 938.

This distinction was expressly repudiated in Jacobs v. Morange (1871) 47 N. Y. 57.

In a few states by statute a recovery is allowed of money paid under mutual mistake of law. Gregory v. Clabrough's Ex'rs (1900) 129 Cal. 475, 62 Pac. 72; Bottego v. Carroll et al. (1904) 31 Mont. 122, 77 Pac. 430. Also in North Dakota, South Dakota, and Oklahoma. See Woodward, Quasi Contracts, § 39.

he thought under the law he was required to do, and not upon the amount of the claim less the proceeds of the sale of the stock. This Court after the payment of the dividend to defendant by plaintiff, in the case of State National Bank v. Esterly, decided that in such a case the creditor is only entitled to a dividend upon the balance remaining after deducting the proceeds of the collateral taken to secure the debt; and the case was affirmed by the Supreme Court by a divided court (69 Ohio St. 24, 68 N. E. 582).

After the decision in the Esterly Case by the Supreme Court, plaintiff filed his cross-petition in this case, which is the original case in which the receiver was appointed, asking that defendant be required to pay back to him the amount so paid by mistake, as the assets of Koll were not sufficient to pay all his debts. Defendant contests this claim of plaintiff and insists that he has a right to retain the full amount received by him. In the agreed statement of facts submitted to us, the reason assigned why plaintiff paid over to defendant the dividend upon the full amount of the claim of Greiner & Son, and not upon the amount of the claim after deducting the proceeds of the collateral, is that it was the general custom in this state to do so, and that he understood that to be the law, as established by decisions in the highest courts of many of the states, and by the lower courts of this state, and that there was no decision of the Supreme Court upon the question. In the case of Jelke v. Stalls, 1 Ohio N. P. page 29, it was decided by a very eminent judge that the creditor was entitled to a dividend upon the full amount of his claim, and this opinion is supported by many decisions of different states, as well as of the federal and English courts. Merrill v. National Bank of Jacksonville, 173 U. S. 131, 19 Sup. Ct. 360, 43 L. Ed. 640, and cases therein cited.

Plaintiff was a lawyer and was familiar with these decisions, and the payment of the dividend by defendant was a pure mistake of law with no mixture of fact. Furthermore, there is no claim that any misrepresentation or fraud was practiced by defendant, and it could not be said that defendant had any advantage in the transaction that would require a court of equity to interfere any more than a court of law.

The rule in such cases is well stated in Eng. & Am. Enc. of L. (2d Ed.) vol. 20, page 816: "It is one of the fundamental maxims of the common law that ignorance of the law excuses no one. It is a maxim founded not only on expediency and policy, but on necessity. 'If ignorance of the law could be admitted in judicial proceedings as a ground of complaint or of defense, courts would be involved and perplexed with questions incapable of any just solution, and embarrassed by inquiries almost interminable, until the administration of justice would become in effect impracticable. There would be but few cases in which one party or the other would not allege it as a ground of exemption; and the extent of the legal knowledge of each individual suitor, not his acts or words, would be the material fact on which judg-

ments would be founded.' It is therefore applied most rigidly at law, and is only relaxed in equity where the mistake is mixed with misrepresentation or fraud, or where the ignorance of the complainant has conferred upon the defendant a benefit which he can not in good conscience retain." In note 7 it is stated: "If one of the parties to a contract is in truth ignorant of a matter of law involved therein, and the other party, knowing him to be so, takes advantage of the circumstance, he is guilty of fraud and the court will relieve."

But it is hardly necessary to go outside of our own state for authorities as the case of Phillips, Executor, v. McConica, Guardian, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753, is directly in point except it was an action at law. In that case it was held that "money voluntarily paid by an executor, upon distribution, to one not entitled to receive the same, under a mistake of his rights and duties as executor, there being no mistake of fact, can not be recovered back."

That case, like this, was between trustees, the money having been paid by an administrator in the settlement of an estate to a guardian of a minor, which minor the executor assumed was a legatee under the law, but which, in fact, was not the case. The minor had no claim upon the fund whatever, and yet the court says in the opinion: "The executor had the right to obtain the judgment of the court as to the proper person to receive this money, as was done in Upson v. Noble, 35 Ohio St. 655; Rev. St. § 6202. But, knowing all the facts, he did not seek the direction of the court, but relying upon his own judgment, paid the money at his own peril. If he intended to litigate the matter he should have litigated before payment. It is now too late, unless he can show he paid it under a mistake of fact, and this his present petition fails to show."

It is again contended by plaintiff that because at the time of the payment of this dividend to defendant it was the settled law in Ohio that the dividend should be paid upon the full amount of the claim, the money should be ordered paid back. This claim is entirely too broad. At the time of payment there was no decision of our Supreme Court upon the question, and the decision of the Common Pleas Court of Hamilton County in Jelke v. Stalls, supra, and of the United States Circuit Court of Appeals for the Sixth Circuit in a case from the Western Division of the Southern District of Ohio, Chemical Nat. Bank v. Armstrong, 59 Fed. 372, 8 C. C. A. 155, 28 L. R. A. 231, could hardly settle the law in the state.

But if the law had been fully settled as claimed by the plaintiff even by our Supreme Court, and a different holding was afterwards made, the result would be the same. It might be important in a controversy between Ambler and the creditors of Koll, but it would not change the question we are considering at all. "Certainly when the law of a state is changed by judicial decision, it does not open or annul what has been done in other cases of a like kind for years before, under a different understanding of the law. To permit such effect of

the subsequent decision would lead to the most mischievous consequences."

In the case of Lyon v. Richmond, 2 Johns. Ch. (N. Y.) 51, it was held, Chancellor Kent delivering the opinion, that: "1. A subsequent decision of the court of errors in a different case, giving a different exposition of a point of law from the one declared by the Supreme Court, where the parties to a suit entered into an agreement relative to such suit, can have no retrospective effect so as to destroy the operation of such agreement. The court does not relieve parties from their acts and deeds fairly done, on a full knowledge of the facts, though under a mistake of law. Every person is charged, at his peril, with a knowledge of the law."

This decision was made in 1816, and it seems to have been generally followed in all the states. Pittsburg & Lake Angeline Iron Co. v. Lake Superior Iron Co., 118 Mich. 109, 76 N. W. 395, and cases and authorities there cited.

Finding and decree in favor of defendant, dismissing the cross-petition of plaintiff at his costs.[3]

ERKENS v. NICOLIN.

(Supreme Court of Minnesota, 1888. 39 Minn. 461, 40 N. W. 567.)

Appeal by defendant from an order of the district court for Scott county, Edson, J., presiding, refusing a new trial by the court.

MITCHELL, J. Action to recover back the money paid by plaintiff to defendant for a quitclaim deed of a piece of land in the village of Jordan. The facts, as disclosed by the evidence, are that defendant platted into lots a tract of land, of which he was the owner, lying between Water street and Sand creek. As shown upon the plat, the north and south lines of the lots extend from Water street to the creek. The distance marked on the plat gave the length of these lines as 80 feet, but the actual distance from Water street to the creek was 110 feet. One of these lots, and the adjoining 35 feet of another, had been conveyed by defendant, according to the plat, to plaintiff or plaintiff's grantor. Subsequently defendant claimed and stated to plaintiff, in substance, that the lots only extended back 80 feet, according to the distance indicated on the plat, and hence that he still owned the strip of 30 feet next to the creek. Plaintiff knew that defendant's claim was based wholly upon the theory that the distance given on the plat would control, and hence that his claim of title was in fact but expressions of opinion as to the legal effect and construction to be given to

[3] Accord: Henderson v. Folkstone Waterworks Co. (1885) 1 T. L. R. 329, in which case Lord Coleridge said: "Here at the time the money was paid, which was before Dobbs's Case, the law was in favor of the company, and there was no authority to show that it could be recovered back on account of a judicial decision reversing the former understanding of the law."

the plat. So far as the evidence shows, defendant made this claim in good faith, and honestly supposed that his deeds of the lots only conveyed 80 feet. Plaintiff took the matter under consideration for nearly a month, and went to the register's office and examined the plat for himself. He then obtained from defendant and wife a quitclaim deed of all the land down to the creek, and paid therefor the money which he now seeks to recover. When he paid the money he knew all the facts, and had the same means of knowledge of them which defendant had. The transaction was unaffected by any fraud, trust, confidence, or the like. The parties dealt with each other at arm's length. Plaintiff was not laboring under any mistake of facts. He took the deed, and paid his money under a mistake of law as to his antecedent existing legal rights in the property, supposing that, according to the proper legal construction of the plat, the lots were only 80 feet deep. However, under the doctrine of Nicolin v. Schneiderhan, 37 Minn. 63, 33 N. W. 33, since decided by this court, it is now settled that a deed of lots according to this plat would cover all the land down to the creek, under the rule that distances must yield to natural boundaries called for in a deed. We are unable to see that this case differs in principle from Perkins v. Trinka, 30 Minn. 241, 15 N. W. 115, and Hall v. Wheeler, 37 Minn. 522, 35 N. W. 377.

It is unnecessary to enter into any discussion of the question (left in great confusion in the books) when, if ever, relief will be granted on the ground of mistake in law alone, or whether there is any difference between mistake of law and ignorance of law, or between ignorance or mistake as to a general rule of law and ignorance or mistake of law as to existing individual rights in the property which is the subject matter of the contract. We hold that money paid under mistake of law cannot be recovered back where the transaction is unaffected by any fraud, trust, confidence, or the like, but both parties acted in good faith, knew all the facts, and had equal means of knowing them, especially where, as was evidently the fact in this case, the transaction was intended to remove or settle a question of doubt as to title. It would be impossible to foresee all the consequences which would result from allowing parties to avoid their contracts in such cases on the mere plea of ignorance or mistake of law affecting their rights. It would be difficult to tell what titles would stand, or what contracts would be binding, if grantors and grantees were at liberty to set up such a plea. This may seem to work inequitably in the present case, but more mischief will always result from attempting to mould the law to what seems natural justice in a particular case than from a steady adherence to general principles. Order reversed.[4]

[4] In Troy, Adm'r, v. Bland (1877) 58 Ala. 197, the plaintiff being indebted to the defendant tendered payment in legal tender notes which the defendant declined to accept, save at a discount of 15 per cent., which discount represented the premium on gold at that time. After some negotiations the defendant agreed to accept payment in legal tender notes at 10 per cent. discount. The case of Hepburn v. Griswold (1869) 8 Wall. 603, 19 L. Ed. 513, then re-

VARNUM v. TOWN OF HIGHGATE.

(Supreme Court of Vermont, 1892. 65 Vt. 416, 26 Atl. 628.)

Exceptions from Lamoille County Court; Thompson, Judge. Assumpsit. Plea, the general issue. Plaintiff, a county bridge commissioner paid the defendant town $600 for some old stone piers, the plaintiff desiring to use the stone in building a new county bridge. At the time of the purchase both parties believed that the stone was the property of the defendant. When the plaintiff settled his account with the State Auditor this item of $600 was disallowed upon the ground that the stone were the property of the county and not of the town of Highgate, and should have been used in the rebuilding of the bridge without compensation to any one. Thereupon the plaintiff, without any demand upon the defendant, brought this suit.

At the close of the plaintiff's evidence the defendant moved the court for a verdict in its favor and both parties stated in open court that they did not desire to go to the jury upon any question.

The court directed a verdict for the plaintiff in the sum of $600, with interest from the date of the writ, to which the defendant excepted.

TAFT, J.[5] * * * (b) The plaintiff purchased of the defendant certain stone, and paid $600 for them. The defendant had no right to

cently decided, had held that the Legal Tender Act was unconstitutional. A later decision of the United States Supreme Court (The Legal Tender Cases [1870] 12 Wall. 457, 20 L. Ed. 287) sustained the validity of the Legal Tender Act. The plaintiff after this later decision brought the present action to recover the excess over the amount of his indebtedness which he had paid defendant. The court denied relief on the ground that money paid pursuant to a compromise of a doubtful or disputed claim cannot be recovered, quoting (inter alia) Durham v. Wadlington (1848) 2 Strob. Eq. (S. C.) 258, where the court decided that "when a compromise of a doubtful right is fairly made between the parties whether the uncertainty rests upon a doubt of fact, or a doubt in point of law, if both parties are in the same ignorance, the compromise is equally binding, and cannot be affected by any subsequent investigation and result."

In Hall's Ex'r v. Farmers' Bank of Kentucky (1901) 65 S. W. 365, 23 Ky. Law Rep. 1450, the plaintiff, a guarantor, paid the debt which he had guaranteed although notice of default had not been promptly given as required by law. The court denied recovery on the ground of compromise, quoting from the opinion of Robertson, J., in Underwood v. Brockman (1836) 4 Dana (34 Ky.) 309, 317, 29 Am. Dec. 407, as follows: "Even when it may be evident that there was a mistake as to the law, yet if the question of law were doubtful, and the parties differed with respect to what was the true rule, and had, in consideration of its uncertainty, and in consequence of their diverse opinions respecting it, made a fair compromise, their contract should stand. The doubtfulness of the legal right, and desire to avoid uncertainty of litigation, would be a valuable, meritorious and sufficient consideration to give it legal and effectual application. Were this not so, no compromise of doubtful rights would ever stand, because in every such case the one party or the other must have been mistaken as to the law or the facts, or both."

See also Monroe Nat. Bank v. Catlin (1909) 82 Conn. 227, 73 Atl. 3.

[5] The statement of facts has been rewritten and a portion of the opinion discussing a point of pleading has been omitted.

sell them, had no title to them for that purpose, as they were part of a highway bridge then being rebuilt under the provisions of the statutes. No. 11, Acts 1884, and No. 16, Acts 1886. After the plaintiff's evidence was closed, the defendant did not desire to go to the jury on any question, thereby admitting as proved all the plaintiff's testimony tended to establish. Hamblet v. Bliss, 55 Vt. 535; O'Connor v. Sowles, 57 Vt. 470; Hawkins v. Insurance Co., 57 Vt. 591. Under this rule it may be regarded that it was established upon trial that the contract of sale was made under a mutual mistake of a material fact, viz. the ownership of the stone, or the right of the plaintiff to sell them. This was an error of fact. It may have arisen because the parties misjudged the law, still it was no less an error of fact. Right of private ownership is matter of fact, although it may result from a question of law. It has been held that when a contract, as applied to the subject-matter, conveys a different right, or effectuates a different purpose, from that intended by the parties, although the language of the contract was intentionally used, the mistake is treated as one of fact, not of law. McKenzie v. McKenzie, 52 Vt. 271; Tabor v. Cilley, 53 Vt. 487. By the act of selling the defendant undertook to transfer the property in the stone to the plaintiff, but the latter acquired nothing by the sale, for the town had nothing to convey. A contract so made under a mutual mistake of fact can be avoided in a court of law. Ketchum v. Catlin, 21 Vt. 191; Faulkner v. Hebard, 26 Vt. 452. Upon the ground of a mutual mistake of fact in respect of the subject-matter of the contract the plaintiff had the right to avoid the sale, and is entitled to recover the consideration he paid for the stone.

(c) It is insisted that a demand was necessary before suit. When money is paid by mistake, a demand is sometimes necessary, sometimes not. When the payor is not in fault, and the payee receives the money in his own wrong, no demand is necessary, and none of the cases cited upon this point so holds. The plaintiff was not in fault. When informed by the selectmen of the town that they claimed the court had held that the stone belonged to the town, he journeyed to St. Johnsbury, to see one of the members of the court, and was confirmed in his belief of that fact. The selectmen ought to have known they had no right to receive the money. They shall not be permitted to say, "We did not know we were doing wrong when we put our hands into the state's treasury, and took so much money and put it in our own." No demand was necessary. Sharkey v. Mansfield, 90 N. Y. 227, 43 Am. Rep. 161.

(d) The legal title of the money paid the defendant was in the plaintiff. He drew it from the state treasury, and was accountable for it to the state. Sections 5, 6, No. 16, Acts 1886. The plaintiff can recover it in an action in his own name against the defendant.

(e) No question of a disputed claim and a compromise thereof is presented by the evidence.

(f) No laches appear on the part of the plaintiff. The suit was brought within two years from the time the state auditor disallowed the item sought to be recovered, and the defendants have not been injured by the delay. Judgment affirmed.[6]

[6] MISTAKE AS TO THE CONSTRUCTION OF A DEED.—In Stanley Brothers, Limited, v. Corporation of Nuneaton (1912) 107 L. T. Rep. 760, it appeared that the plaintiffs had conveyed certain land to the defendant upon which land were shafts containing a supply of water, and that the defendant purchased this land to be used as a part of its waterworks system. In the deed of conveyance it was provided that under certain conditions (which in this case had happened) the plaintiffs might purchase water from the defendants at the rate of 2d. per thousand gallons. By mistake the plaintiff had for twelve years past been paying the defendant 8d. per thousand gallons, the regular price charged by the defendant. The Court held that in so far as their claim was not barred by the statute of limitations the plaintiffs might recover such excess payments. In reply to the suggestion of defendant's counsel that the plaintiffs' ignorance of their rights under this conveyance constituted a mistake of law and not one of fact, Bailhache, J., said: "I do not think, whether I regard the ignorance in this as being ignorance of the fact that the conveyance contained this particular covenant or whether I regard it as ignorance of what the meaning of the covenant was, that is such an ignorance of law as prevents me giving the relief to the claimants if I think they are otherwise entitled to it and of ordering the return of the moneys overpaid."

MISTAKE OF LAW IN COURTS OF EQUITY.—In Daniell v. Sinclair (1881) 6 A. C. 181, 190 (a bill in equity to rescind on the ground of mutual mistake of law certain credits erroneously allowed in settling a mortgage account) Sir Robert P. Collier, speaking for the Court, said: "Undoubtedly there are cases in the Courts of common law in which it has been held that money paid under a mistake of law cannot be recovered, and it has been further held that, under certain circumstances, the giving credit in account may be treated as so far equivalent to payment as to prevent sums wrongly credited being made the subject of set-off. Skyring v. Greenwood (1825) 4 B. & C. 281. But in Equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn. In Earl Beauchamp v. Winn (1873) L. R. 6 H. L. 223, Lord Chelmsford observes: 'With regard to the objection, that the mistake (if any) was one of law, and that the rule "ignorantia juris neminem excusat," applies, I would observe on the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. That is very different from the ignorance of a well known rule of law; and there are many cases to be found in which Equity, upon a mere mistake of the law, without the admixture of other circumstances has given relief to a party who has dealt with his property under the influence of such a mistake.' In Cooper v. Phibbs (1867) L. R. 2 H. L. 149, Lord Westbury said: 'Private right of ownership is a matter of fact; it may be also the result of matter of law; but if parties contract under a mutual mistake as to their relative and respective rights, the result is that that agreement is liable to be set aside, as having proceeded upon a common mistake.' In McCarthy v. Decaix (1831) 2 Russ. & My. 614, where a person sought to be relieved against a renunciation of a claim to property, made under a mistake respecting the validity of a marriage, the Lord Chancellor observes, 'What he has done was in ignorance of law, possibly, of fact; but in a case of this kind, this would be one and the same thing.' In Livesey v. Livesey (1827) 3 Russ. 287, an executrix, who, under a mistake in the construction of a will, had overpaid an annuitant, was permitted to deduct the amount overpaid from subsequent payments."

For further decisions in equity as to the effect of mistake of law, see Ames' Cases on Equity, vol. II, pp. 250–296; Boke's Cases in Equity, pp. 715–734.

For a discussion of the doctrine of the Roman law and the provisions in the French and German Civil Codes as to the recovery of a payment made under mistake of law, see 7 Columbia Law Review, 476.

MARCOTTE v. ALLEN.

(Supreme Judicial Court of Maine, 1897. 91 Me. 75, 39 Atl. 346, 40 L. R. A. 185.)

On exceptions by defendant.

SAVAGE, J. The plaintiff is an undertaker. The defendant is city clerk of the city of Lewiston. The plaintiff sues in this action for money had and received to recover back fees paid to the defendant for three hundred and seventy-five "burial permits," issued under the provisions of Public Laws of 1891, c. 118, as amended under the provisions of Public Laws of 1895, c. 154. At the conclusion of the plaintiff's evidence, the presiding justice directed a nonsuit, to which ruling the plaintiff excepted.

By statute, the fees of city clerks for issuing burial permits are to be paid by the cities and towns, and it was admitted that "the defendant was paid his legal fees by the city of Lewiston for all the burial permits mentioned in this action prior to March, 1896."

Assuming, as we must, that the plaintiff's evidence was true, the case discloses the following facts: The plaintiff paid the money sued for to the defendant, as fees for burial permits issued by him. A fee of twenty-five cents was paid each time the plaintiff had occasion to require a permit. The plaintiff did not know that the statute required the city to pay the city clerk for his services in issuing permits, nor that the defendant was being paid by the city for the same. The defendant received and kept the money, and did not inform the plaintiff that the city was bound to pay, or was paying his legal fees. The evidence does not show that the defendant demanded pay of the plaintiff as a prerequisite to the issuing of the permits, but the defendant's predecessor in office asked the plaintiff to pay for such permits, which he did, and he "supposed it was the same rule, and paid him (the defendant) right along." From these facts it can hardly be inferred that the defendant thought these payments were gratuities, and we are satisfied that he must have known that the plaintiff paid these fees because he supposed he was bound to. It is clearly a case of payments made in ignorance of the law, and the defendant relies upon the well-settled rule that voluntary payments, made with full knowledge of all the facts, but under a mistake or through ignorance of the law, cannot be recovered. Norris v. Blethen, 19 Me. 348.

The defendant is a public officer, and though he did not expressly demand the payment of these fees he took them knowing that the plaintiff was acting upon a mistaken view of his legal rights. The parties did not stand upon a level. The defendant was in a position where the plaintiff was justified in relying upon his conduct. A public officer must deal fairly with the public. Some courts have sustained actions like this on the ground of public policy. In American Steamship Co. v. Young, 89 Pa. 186, 33 Am. Rep. 748, the court said of the relations between a public officer and the public: "He and the

public who have business to transact with him do not stand upon an equal footing. It is his special business to be conversant with the law under which he acts, and to know precisely how much he is authorized to demand for his services; but with them it is different. They have neither the time nor the opportunity of acquiring the information necessary to enable them to know whether he is claiming too much or not, and as a general rule, relying on his honesty and integrity, they acquiesce in his demands." See Mayor of Baltimore v. Lefferman, 4 Gill (Md.) 425, 45 Am. Dec. 145, note; Walker v. Ham, 2 N. H. 238; Stevenson v. Mortimer, Cowper, 805.

But without deciding that this action is maintainable on the ground of public policy, we think it can be maintained upon another ground. Whenever, a payment made in ignorance of the law, is induced by the fraud or imposition of the other party, and especially if the parties are not upon an equal footing, an action to recover it back is maintainable. Stover v. Poole, 67 Me. 217; Silliman v. Wing, 7 Hill (N. Y.) 159; Bank of U. S. v. Daniel, 12 Pet. 32, 9 L. Ed. 989. This court has declared in Freeman v. Curtis, 51 Me. 140, 81 Am. Dec. 564, and in Jordan v. Stevens, 51 Me. 78, 81 Am. Dec. 556, that when one, who himself knows the law, and knows another to be ignorant of it, takes advantage of his ignorance, it may be regarded as fraud. His very silence may be fraudulent. Downing v. Dearborn, 77 Me. 457, 1 Atl. 407. For a public officer, whose fees by law are to be paid by the city, and are paid by the city, to receive fees to which he knows he is not entitled, and which he knows are being paid to him by a party, ignorant of the law, who would not pay if he did know the law,—and not to inform him that he was not bound to pay, is fraudulent, and such officer should restore the money which he cannot conscientiously retain. To hold otherwise would be a reproach to the law.

It is the opinion of the court that the admission of the defendant and the evidence introduced by the plaintiff brought the case within this rule, and that the order directing a nonsuit was erroneous.

Exceptions sustained.

CARPENTER v. SOUTHWORTH.

(United States Circuit Court of Appeals, Second Circuit, 1908. 165 Fed. 428, 91 C. C. A. 378.)

In Error to the District Court of the United States for the Northern District of New York.

NOYES, Circuit Judge. The complaint in this action alleges, in substance, that the Remington Automobile & Motor Company, a corporation, went into bankruptcy; that a call was made by order of the District Court upon certain unpaid stock subscriptions; that an appeal was taken from such order to this court, where it was affirmed, but without prejudice to any defenses stockholders might have in

plenary actions to recover their respective assessments (see In re Remington Automobile, etc., Co., 153 Fed. 347, 82 C. C. A. 421); that the plaintiff, who was a stockholder and subject to the call, learned from a newspaper of the decision of this court and believed that it held him liable, although he was not advised as to its terms; that he thereupon called upon the defendant, who was trustee of the bankrupt corporation; that the defendant did not show or tell him the contents of the decision, "but informed him that the Ilion stockholders would have to pay, and that his payment would release him"; and that, relying upon this statement and in the belief that he had no further opportunity to defend himself, he paid the amount of his assessment, $1,250. The plaintiff seeks in this action to recover the money so paid upon the ground of payment by mistake. The defendant filed a general demurrer, which was sustained by the District Court, and, the plaintiff, not availing himself of the privilege of amending, the complaint was dismissed.

Whether the mistake which the plaintiff sets up was a mistake of law, or of mixed law and fact, is not material. While payments made under a mistake of law are, as a general rule, not recoverable, an exception is made in the case of such payments made to trustees in bankruptcy or other officers of courts. As stated by Lord Justice James in Ex parte James, L. R. 9 Chancery Appeals, 609, 614: "With regard to the other point, that the money was voluntarily paid to the trustee under a mistake of law, and not of fact, I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it. I am of opinion that a trustee in bankruptcy is an officer of the court. He has inquisitorial powers given him by the court, and the court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people." See, also, Ex parte Simmonds, L. R. 16 Q. B. 308; Gillig v. Grant, 23 App. Div. 596, 49 N. Y. Supp. 78.

These cases are based upon the proposition that, while an individual litigant may retain moneys paid through a mistake of law, a court will not permit its officers to take advantage of any such mistake and keep moneys belonging to another. The difficulty with the plaintiff's cause of action as stated in his complaint is, however, that it is not sufficiently alleged that the money in the hands of the defendant belongs to another. It is not alleged that the mistake under which the payment was made was material. It does not appear that, if the plaintiff had known the precise terms of the decision, he would not have made the payment. It is not alleged that the plaintiff had any defense to a plenary action for the recovery of the assessment, or that he in-

tended to make any defense if afforded opportunity. The plaintiff in his brief says that "under the decision of this court complainant was not liable." This is a mistake. He was liable, unless he had a valid defense and chose to interpose it.

An action for the recovery of money paid by mistake is equitable in its nature, and when a payment is made which the payee in good conscience is entitled to retain it cannot be recovered. The principle is stated by Lord Mansfield in the early case of Bize v. Dickason, 1 T. R. 285: "The rule has always been that if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back as a debt barred by the statute of limitations or contracted during infancy; but where the money was paid under a mistake, which there was no ground to claim in conscience, the party may recover it back."

The general allegation in the complaint that the money sought to be recovered rightfully belongs to the plaintiff merely states an inference or conclusion from the other facts, which are in themselves insufficient. It does not help them out and show the materiality of the mistake. Upon the complaint as it stood the demurrer was properly sustained, and, as the plaintiff did not amend, the judgment dismissing the complaint was correct, and must be affirmed.

In affirming the judgment, however, we deem it proper to say that it would seem to us appropriate for the District Court to enter another order, upon the application of the present plaintiff, directing the trustee to retain the said money paid to him until the determination of a new action for the recovery of the same, should said plaintiff institute it in said court within a specified time.

COUNTY OF WAYNE v. REYNOLDS.

(Supreme Court of Michigan, 1901. 126 Mich. 231, 85 N. W. 574, 86 Am. St. Rep. 541.)

Error to circuit court, Wayne county; Morse Rohnert, Judge.

Action by the county of Wayne against Henry M. Reynolds to recover money wrongfully paid to defendant as compensation additional to his salary as county clerk. From a judgment on a verdict directed in favor of defendant, plaintiff brings error.

HOOKER, J.[7] The defendant was the clerk of the county of Wayne, and during the time that he was such clerk he was appointed secretary of a committee of the board of supervisors having in charge the erection of a court house for the county. His appointment was under the following resolution: "Resolved, that Henry M. Reynolds be, and he is hereby, appointed secretary of the committee on public buildings during the erection and completion of the new Wayne county building,

[7] Portions of the opinion are omitted.

to the end of the fiscal year." About four months later the board passed the following resolution: "Resolved, that the county auditors be, and they are hereby, instructed to pay Henry M. Reynolds the sum of $25 per month for the time he has acted as secretary of the committee on site and public buildings; and be it further resolved, that the county auditors be, and they are hereby, instructed hereafter to pay the secretary of said committee the sum of $25 per month during the term of the committee." Other similar resolutions of later date, covering other periods, appear.

Mr. Reynolds performed the services, and received from the board of auditors of the county the sum of $525 for such services. This is an action brought by the county to recover from the defendant this sum, with interest. The circuit judge directed a verdict for the defendant, and the plaintiff has taken a writ of error, upon which the case is before us.

There are two questions: First. Was he lawfully entitled to such compensation? Second. Was the action of the board in making payment conclusive and final?

The following sections of the statutes are cited as bearing upon this controversy: * * * The statute cited not only fixed the compensation of the clerk, but expressly forbids the payment or reception of any further sum for the duties imposed upon him by law. Rectitude of intention upon his part and that of the auditors does not change the character of the transaction, which is ultra vires.

A somewhat similar question arose in the case of Steamship Co. v. Young, 89 Pa. 191, 33 Am Rep. 748, and the right to recover back money was asserted and sustained in favor of a private person against an officer who took illegal fees. The case of Allegheny Co. v. Grier, 179 Pa. 639, 36 Atl. 353, was much like the present case. It was said: "Public revenues are but trust funds, and officers but trustees for its administration for the people. It is no answer to a suit brought by a trustee to recover private trust funds that he had been a party to the devastavit. With much the stronger reason is this doctrine applicable when the interests of the whole people are involved. It is obviously immaterial whether the illegal payment be through design or mistake." In Virginia the attorney general claimed and was allowed and paid extra compensation, and it was recovered back by the state in an action brought for the purpose. Com. v. Field, 84 Va. 31, 3 S. E. 882.

Story says: "If an agent pays money for his principal, by mistake or otherwise, which he ought not to have paid, the agent, as well as the principal, may maintain an action to recover it back. If an agent pays money under a mistake of fact for the principal, the latter may recover it back from the party who had received it; and, if it be paid under a mistake of a legal obligation of his principal, it may be recovered back." Story, Ag. §§ 398–435. See, also, Stevenson v. Mortimer, Cowp. 806. "The act of the agent is not considered the act of the

principal, except when it is within the limits of his authority. * * * But, however it may be when the money is paid by the supposed debtor, no case has gone so far as to decide that an unauthorized payment by an agent, from an erroneous opinion of the legal obligation of his principal, shall be binding upon the principal, and that he cannot recover the money thus unduly paid." U. S. v. Bartlett, Dav. 9, Fed. Cas. No. 14,532.

We do not lose sight of a substantial difference between the case of money paid by an officer, such as a treasurer, in the routine of his office, and money paid upon warrant after allowance, by a board authorized to adjudicate upon claims, and from whose determination the law forbids an appeal, like the board of supervisors in other counties, and the board of auditors in Wayne county. As has been held in the case of Advertiser & Tribune v. City of Detroit, 43 Mich. 116, 5 N. W. 72, where such a board has once passed upon a claim which it had authority to pass upon, it cannot be reviewed, and money paid upon such adjudication cannot be recovered back in an action upon the ground that the charge was excessive. To permit it would be to reopen every case where an excessive allowance had been made for services rendered, and for which there is an obligation to pay something. We have found no case which precludes such recovery when a board has allowed a claim which was wholly fictitious or expressly forbidden by law, and, with one or (possibly) two exceptions, the same may be said of claims which the law does not recognize as lawful charges against the municipality.

Our law prescribing the duty of boards of supervisors is taken from New York, where similar duties and powers are imposed and granted. It has never been held in that state that money once allowed and paid could not be recovered back in a case where the law did not recognize the claim allowed as one that could be a proper charge against the county. Thus, in the case of Board v. Ellis, 59 N. Y. 620, it was held that a board of supervisors had no power to audit and allow an account not legally chargeable to the county, and that if they did, and it was paid, such payment was not voluntary, and that an action lay to recover back the money paid. The case was much like the present one in all of its features. Folger, J., said: "Doubtless, if a board of supervisors at one time acts finally upon a matter of which they have jurisdiction, and as to which they have a lawful right to act, a succeeding board may not undo what they have done, to the detriment of third parties. * * * A board of supervisors has no power to audit and allow accounts not legally chargeable to their county, and, if it attempts to do so, it is an act in excess of jurisdiction, done without the power to make it valid, and is null and void." See, also, Smith v. City of Newburgh, 77 N. Y. 130.

A more recent case contains an elaborate discussion of this subject. Under a law which permitted the issue of bonds for the raising of funds to build waterworks, but which forbade their sale at less than

par, a contract was made which was ultimately held to be within the prohibition. The water board undertook to compromise this matter, and the court held that it was outside of their jurisdiction. Mr. Justice Vann said: "The statute forbade the payment from the funds of the water board, and action forbidden by statute is void. A void act is no act, and a void payment is no payment. Such a payment is not voluntarily made by the corporation, but by its agent in excess of authority and in defiance of its rights. It is not the act of the corporation itself, but of one who without authority assumed to act for it. * * * It is a matter of grave public concern to protect municipal corporations from the unauthorized and illegal acts of their agents in wasting the funds of the taxpayers. It is only with the utmost difficulty that municipal officers and agents can be kept within the bounds of their authority now, but once let it go forth as the settled law of the state that an illegal contract can become the basis of a lawful compromise entered into between the contractor and an agent guilty of the illegal action, and a new door will be open to municipal spoliation. If a paving contract is let to the highest instead of the lowest bidder, in violation of a statute requiring competition, a compromise with the contractor, followed by payment of a gross sum equal to all the profits that he could have made on the contract if executed, should not enable him to keep the spoils and defy the public. Sound public policy will not permit the courts to countenance this dangerous method of evading a statute, for it will always be done under the claim of good faith, and the fraud beneath will be hard to discover." Village of Ft. Edward v. Fish, 156 N. Y. 375, 50 N. E. 973; Ellis v. Board, 107 Mich. 536, 65 N. W. 577.[8] * * *

The judgment is reversed, and a new trial ordered.[9]

[8] The court here discussed Advertiser & T. Co. v. Detroit (1880) 43 Mich. 116, 5 N. W. 722, and County of Wayne v. Randall (1880) 43 Mich. 137, 5 N. W. 75, expressing disapproval of the former and overruling the latter case.

[9] In Ada County v. Gess (1895) 4 Idaho, 611, 616, 43 Pac. 71, the court said: "Some authorities go so far as to hold that payments of the money of the public by its authorized agent to an officer on account of a mistake of law cannot be recovered back. The doctrine is so repugnant to every principle of justice and common honesty that the latter cases do not, by their reasoning, commend themselves to this court. We cannot consent to carry the doctrine beyond settlements between private individuals. Therefore we must hold that payments made by the county commissioners to public officers, which are positively and absolutely forbidden by the statutes of the state and by the constitution thereof, may be recovered back. Both are public officers, and it is the duty of both to see to it that the county is not damaged through their malfeasance, negligence or mistake."

In Village of Morgan Park v. Knopf (1902) 199 Ill. 444, 65 N. E. 322, the court denied a recovery of illegal fees paid to defendant, a public officer, from the public treasury, saying: "There was no fraud or mistake of fact, and if there was any mistake it was one of law, and the money having been voluntarily paid under such circumstances, no action would lie to recover it back. This rule, which is well settled as between individuals, has been extended to municipal corporations under similar circumstances. People v. Foster (1890) 133 Ill. 496, 23 N. E. 615."

The recent decisions are collected in a note in Ann. Cas. 1915B, 811.

HAVEN v. FOSTER.

(Supreme Judicial Court of Massachusetts, 1829. 9 Pick. 112, 19 Am. Dec. 353.)

Assumpsit for money had and received, and money paid. The parties stated a case.

On the 19th of September 1819, Andrew Craigie, of Cambridge in this commonwealth, died there, intestate, seised in fee simple of certain land in the state of New York, and of real estate of greater value in Massachusetts, leaving his niece Elizabeth, the wife of the plaintiff, and his three nephews, Andrew Foster, John Foster, and the defendant, his heirs at law, the niece being the child of the intestate's sister Elizabeth, and the nephews the children of his sister Mary, and all four being children of the same father, Bossenger Foster.

In October 1819, administration upon the estate of Craigie was granted in this commonwealth to his widow. No letters of administration were taken out in New York.[10] * * *

MORTON, J.[11] [After stating some of the facts:] By the statute of distributions of this state these heirs, standing in the same degree of relationship to the intestate, inherited his estate in equal proportions. But by the statute of New York, which carries the doctrine of representation farther than the law of this state, or indeed than the civil or common law, these heirs inherited per stirpes and not per capita. So that the estate in New York descended, one half to the wife of the plaintiff, and the other half to the defendant and his two brothers; being one sixth instead of one quarter to each.

Of the provisions and even existence of this statute, all the heirs were entirely ignorant during the whole of the transactions stated in the case. The plaintiff having discovered the mistake, now seeks by this action to reclaim of the defendant one third of the amount received by him on account of the sale of the New York lands, with interest from the time of its receipt. And the question now submitted to our decision is, whether he is entitled to a repetition of the whole or any part of this amount.

Had the parties been informed of their respective rights under the laws of New York, it cannot be doubted that the plaintiff would have retained one moiety of the land in that state, or would have received to himself one half of the consideration for which it was sold. The distribution of the avails of the sale was made by the heirs upon the confident though mistaken supposition, that they were equally entitled to them. They acted in good faith, upon a full conviction that they

[10] The four heirs had sold their several interests in the land in New York to one Tufts and had divided the purchase money among themselves in even shares.

[11] Some of the facts and a portion of the opinion, both dealing with another matter, are omitted.

were equal owners of the estate. It turned out, however, to the surprise of all of them, that they owned the estate in very unequal proportions, and that the defendant and his brothers had received not only the price of their own estate, but also the price of a part of the plaintiff's estate.

Equity would therefore seem to require, that the defendant should restore to the plaintiff the amount received for the plaintiff's estate. It was received by mistake, and but for the mistake would not have come to the defendant's hands. If the whole estate had been owned by the plaintiff, and the defendant, having no interest in it, had received the whole consideration, the equitable right of repetition would have been no stronger; it might have been more manifest.

The suggestion that the provisions of the New York statute are in themselves inequitable, is no answer to this view of the case. Whether the law of descent in that state is more or less reasonable and just than ours, it is neither our province nor desire to inquire. All statutes regulating the descent and distributions of intestate estate may be considered as positive, and in some degree, arbitrary rules. And when a person, by inheritance or purchase, becomes lawfully seised of any estate without fraud or fault on his part, it would be as inconsistent with sound ethics, as with sound law, to devest him of it because the rule of law by which he held it was deemed unreasonable. And if, by accident or mistake, another should get possession, it is not easy to see upon what principle he would be justified in retaining it.

In the case at bar, the division of the consideration money was made by the agreement of all the parties interested. The defendant received the money with the plaintiff's consent. But it was an implied, rather than express agreement.

The defendant also received the money under a claim of right. The defendant believed himself to be legally and equitably entitled to one quarter part of the proceeds of the sale. And under this belief he claimed it as being rightfully due to him, and the plaintiff, under the influence of the same belief, assented to the justice of the claim, and agreed to the equal distribution which was made.

It was not however paid to the defendant by way of compromise. No controversy existed between the parties. There was not even a difference of opinion between them in relation to their respective purparties in the estate before it was sold, or to the apportionment of the avails after the sale. There was therefore no room for concession on the one side or the other, and nothing between them which could be the subject of compromise.

Nor do the facts furnish any ground to presume that the plaintiff intended to grant any thing to the defendant, or to yield any of his legal rights. Nemo presumitur donare. And we have no reason to believe that the plaintiff intended to give away any part of his own property, or his wife's inheritance.

The mistake in the distribution of the consideration money for which the land was sold, arose from the mutual ignorance of the law of descents in New York. Can this mistake be corrected and the plaintiff be restored to the rights which he had under this statute?

It is in the first place objected, that the plaintiff's ignorance was owing to his own negligence; that he shall not be allowed to take advantage of his own laches; that what a man may learn with proper diligence, he shall be presumed to know; and that against mistakes arising from negligence, even a court of equity will not relieve.

In all civil and criminal proceedings every man is presumed to know the law of the land, and whenever it is a man's duty to acquaint himself with facts, he shall be presumed to know them. But this doctrine does not apply to the present case. It was not the duty of the plaintiff to know the laws of New York, nor does ignorance of them imply negligence. Knowledge cannot be imputed to the plaintiff, and it is expressly agreed that he, as well as the defendant, was entirely ignorant of the statute of New York. Besides, it was as much the duty of the defendant as of the plaintiff, to be acquainted with the laws of New York. And if either is guilty of negligence, both are, in this respect, in pari delicto.

The objection that the title to real estate cannot be tried in this form of action, cannot avail the defendant; because it seems to us very clear, that no title is or can be drawn in question, in the present case.

The principal objection to the plaintiff's recovery, and the one most relied upon by the defendant's counsel, is, that the payment to the defendant was made through misapprehension of the law, and therefore that the money cannot be reclaimed.

It is alleged, that to allow the plaintiff to recover in the present action, would be to disregard the common presumption of a knowledge of the law, and to violate the wholesome and necessary maxim Ignorantia juris quod quisque tenetur scire, neminem excusat. This objection has been strongly urged by the defendant's counsel, and learnedly and elaborately discussed by the counsel on both sides. It is believed that all the authorities applicable to the point, from the civil as well as the common law, have been brought before the Court.

Whether money paid through ignorance of the law can be recovered back, is a question much vexed and involved in no inconsiderable perplexity. We do not court the investigation of it, and before attempting its solution, it may be well to ascertain, whether it is necessary to the decision of the case before us.

That a mistake in fact is a ground of repetition, is too clear and too well settled to require argument or authority in its support.

The misapprehension or ignorance of the parties to this suit, related to a statute of the state of New York. Is this, in the present question, to be considered fact or law?

The existence of any foreign law must be proved by evidence showing what it is. And there is no legal presumption that the law of a foreign state is the same as it is here. 2 Stark. Ev. (Metcalf's Ed.) 568; Male v. Roberts, 3 Esp. Rep. 163. If a foreign law is unwritten, it may be proved by parol evidence; but if written, it must be proved by documentary evidence. Kenny v. Clarkson, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336; Frith v. Sprague, 14 Mass. 455; Consequa v. Willings, 1 Pet. C. C. R. 229, Fed. Cas. No. 3,128. The laws of other states in the Union are in these respects foreign laws. Raynham v. Canton, 3 Pick. 293.

The courts of this state are not presumed to know the laws of other states or foreign nations, nor can they take judicial cognizance of them, till they are legally proved before them. But when established by legal proof, they are to be construed by the same rules and to have the same effect upon all subjects coming within their operation, as the laws of this state.

That the lex loci rei sitæ must govern the descent of real estate, is a principle of our law, with which every one is presumed to be acquainted. But what the lex loci is, the Court can only learn from proof adduced before them. The parties knew, in fact, that the intestate died seised of estate situated in the state of New York. They must be presumed to know that the distribution of that estate must be governed by the laws of New York. But are they bound, on their peril, to know what the provisions of these laws are? If the judicial tribunals are not presumed to know, why should private citizens be? If they are to be made known to the court by proof, like other facts, why should not ignorance of them by private individuals have the same effect upon their acts as ignorance of other facts? Juris ignorantia est, cum jus nostrum ignoramus, and does not extend to foreign laws or the statutes of other states.

We are of opinion, that in relation to the question now before us, the statute of New York is to be considered as a fact, the ignorance of which may be ground of repetition. And whether ignorantia legis furnishes a similar ground of repetition, either by the civil law, the law of England, or the law of this commonwealth, it is not necessary for us to determine. The examination, comparison and reconciliation of all the conflicting dicta and authorities on this much discussed question is a labour which we have neither leisure nor inclination to undertake.

In the view which we have taken of this case, it appears that the defendant received a part of the consideration for which the plaintiff's estate was sold; that it was received by mistake; and that this mistake was in a matter of fact. He therefore has in his hands money which ex æquo et bono he is bound to repay, and there is no principle of law which interposes to prevent the recovery of it out of his hands.

The action for money had and received, which for its equitable

properties is ever viewed with favour, is the proper remedy for its repetition. The mode in which the payment was originally secured by bond and mortgage, forms no objection to the recovery, inasmuch as the money was in fact paid before the action was commenced. The plaintiff's remedy will extend to all the money actually received by the defendant beyond his legal proportion of the estate. * * *

Upon a view of the whole case, it is the opinion of the Court, that the plaintiff recover one third of the whole amount received by the defendant on account of the sale of lands in New York, with interest from the service of the writ.[12]

[12] In Bank of Chillicothe v. Dodge (1850) 8 Barb. (N. Y.) 233, the plaintiff, an Ohio corporation, discounted in Ohio defendant's bill of exchange which bill of exchange was illegal by a statute of New York. Defendant was a resident of New York. Plaintiff brought assumpsit in New York to recover the sum advanced. Held for plaintiff, on the ground that, the paper being void, the money innocently paid defendant was without consideration. The plaintiff advanced the money in Ohio and being an Ohio corporation, was not presumed to have notice of the New York statute.

CHAPTER III

BENEFITS CONFERRED UNDER A CONTRACT WHICH HAS BEEN PARTIALLY PERFORMED

SECTION 1.—FURTHER PERFORMANCE IMPOSSIBLE

I. By Defendant

ANONYMOUS.

(Court of King's Bench, 1683. 2 Show. 283.)

This was ruled by Saunders, Chief Justice, on evidence in a trial at Guildhall.

First, Freight is the mother of wages; and wheresoever freight is due, wages is so.

Secondly, If a ship be lost before it comes to a delivering port, no freight nor wages is due; if lost afterwards it is due to the last delivering port.

Thirdly, Advance money paid before, if in part of freight, and named so in the charter party, although the ship be lost before it come to a delivering port, yet wages are due according to the proportion of the freight paid before; for the freighters cannot have their money.

REINA v. GROSS.

(Supreme Court of California, 1856. 6 Cal. 29.)

Appeal from District Court of the Twelfth Judicial Circuit.

Terry, J.[1] This action was brought by plaintiff to recover from defendant certain money advanced on a contract of affreightment.

The complaint alleges that defendant contracted to carry certain freight from the port of Acapulco to Valparaiso, in consideration of a certain sum of money, a portion of which was paid by plaintiff in advance. That defendant received said freight on board his vessel and departed on the voyage, but did not perform his contract, because of the loss of said vessel at sea.

The complaint also contains a second count for money received to the use of plaintiff. To this complaint defendant demurred, on

[1] The statement of facts is omitted.

the ground that the complaint did not state facts sufficient to constitute a cause of action. The Court below sustained the demurrer, and judgment was rendered in favor of defendant. From this judgment, plaintiff appealed.

The second count of the complaint is bad, because it is not alleged that demand had been made on defendant. A party receiving money to the use of another, is rightfully in possession until the same is demanded.

The only question involved in this case is, the right of plaintiff to recover advanced freight money upon the non-performance of the contract of affreightment.

The general rule of law is, that where money is paid by one person in consideration of an act to be done by another, and the act is not performed, the money so paid may be recovered back. Contracts for carrying freight form no exception to this rule, unless by express stipulation of the parties.

Chief Justice Kent, in Watson v. Duykinck, says: "The general rule undoubtedly is, that freight is lost unless the goods are carried to the port of destination. The rule seems also to go further, and to oblige the master, in case of shipwreck, to restore to the shipper the freight previously advanced." See 3 Johns. (N. Y.) 339, and cases there cited. The general principle undoubtedly is, "that freight is a compensation for the carriage of goods, and if paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it then forms the ordinary case of money paid upon a consideration which happens to fail." 3 Johns. (N. Y.) 340.[2]

Chief Justice Parker, in Griggs v. Austin, 3 Pick. (Mass.) 23, 15 Am. Dec. 175, says: "It would be an affectation of learning to go over the ground so ably pre-occupied in the opinion given in that case, (Watson v. Duykinck,) especially as the same ground has been traversed by Mr. Justice Story in a note to his edition of Abbot on Merchant Ships. It is sufficient then to say, that by reference to the above cited opinion, and the note of Mr. Justice Story, it will be found to be the established law of the maritime countries on the continent of Europe, that freight is the compensation for the carriage of goods, and if it be paid in advance, and the goods be not carried by reason of any event not imputable to the shipper, it is to be repaid, unless there be a special agreement to the contrary." See, also, Sansom v. Ball, 4 Dall. 459, 1 L. Ed. 908; Giles v. Brig Cynthia, 1 Pet. Admr. R. 203, Fed. Cas. No. 5,424, et seq.; Cheriot v. Barker, 2 Johns. (N. Y.) 346, 3 Am. Dec. 437; Gillan v. Simkin, 4 Camp. 241; Harris v. Rand, 4 N. H. 259, 555, 17 Am. Dec. 421; 3 Kent's Com. 226, 227.

[2] In Watson v. Duykinck (1808) 3 Johns. (N. Y.) 339, the court denied a recovery of freight paid in advance on the ground that the contract in that case was simply to deliver on board, Kent, C. J., saying: "The consideration is rendered by receiving the goods on board and making all due and bona fide efforts to carry and deliver them."

I am aware that there are decisions of the English Admiralty Courts which seem to be in conflict with the cases cited;[3] but the weight of authority, and the uniform ruling of the American Courts, are conclusive as to the right of the shipper to recover.

The final judgment of the Court below, as well as the judgment sustaining the demurrer, is reversed with costs, and the cause remanded.[4]

WRIGHT v. NEWTON.

(Court of Exchequer, 1835. 2 Cromp. M. & R. 124.)

Assumpsit for money had and received. Plea, non assumpsit.

At the trial before Alderson, B., at the last Lancaster Assizes, it appeared that the defendant being in the occupation of a public-house, and being desirous of leaving it, entered into a verbal agreement with the plaintiff for the sale to him, on behalf of a Mrs. Williams, of the good-will and fixtures of the house, at the sum of £120., £50. of which was to be paid on the Monday after, if the landlord consented to the change of tenancy, and on payment of the remainder of the money the defendant was to give up possession. The £50. was paid to the defendant on the 19th of May, and on the 20th, on application being made to the landlord, he verbally agreed to accept Mrs. Williams as tenant. In consequence of this, Mrs. Williams, for whom the house had been taken by the plaintiff, removed, and took her furniture to the defendant's house, and went to reside there, and continued there for five or six weeks and carried on the business, but the defendant and his wife also continued to reside there. It appeared

[3] "It is settled by the authorities referred to in the course of the argument, that by the law of England a payment made in advance on account of freight cannot be recovered back in the event of the goods being lost, and the freight therefore not becoming payable. I regret that the law is so. I think it founded on an erroneous principle and anything but satisfactory; and I am emboldened to say this by finding that the American authorities have settled the law upon distinctly opposite principles, and that the law of every European country is in conformity with the American doctrine and contrary to ours." Per Cockburn, C. J., in Byrne v. Schiller (1871) L. R. 6 Ex. 319, at 325.

In Allison v. Bristol Marine Insurance Co. (1876) L. R. 1 H. L. 209, at 226, Brett, J., explained the English doctrine "that the money to be paid in advance of freight, must be paid, though the goods are before payment lost by perils of the sea, and cannot be recovered back after, if paid before the goods are lost by perils of the sea," by saying: "It arose in the case of the long Indian voyages. The length of voyage would keep the shipowner for too long time out of money; and freight is much more difficult to pledge, as a security to third persons, than goods represented by a bill of lading. Therefore the shipper agreed to make the advance on what he would ultimately have to pay, and, for a consideration, took the risk in order to obviate a repayment, which disarranges business transaction."

[4] Similarly in the United States a passenger may recover unearned passage money paid in advance. Brown v. Harris (1854) 2 Gray (Mass.) 359. ("Passage money and freight are governed by the same rules.") The English courts do not allow a recovery of passage money. Gillan v. Simkin (1815) 4 Campb. 241.

that, on the 2d of June, the landlord withdrew his consent to accept Mrs. Williams as tenant. The defendant on being informed of this, said that Mrs. Williams might keep his, the defendant's, name up, and he would give possession in spite of the landlord. Mrs. Williams subsequently, by the defendant's consent, took away her furniture, but the defendant refused to return the £50. The defendant afterwards sold the good-will and fixtures to another person, who was accordingly let into possession. This action was brought to recover back the sum of £50., as money had and received for the use of the plaintiff. The learned Baron left it to the jury to say whether the parties had agreed to rescind the contract, and if they were of that opinion, he directed them to find a verdict for the plaintiff; which they accordingly did.

Cresswell now moved by leave of the learned Baron to enter a nonsuit.

PARKE, B. It seems to me that this was a contract with a condition that the landlord's consent should be obtained; and the question is, has that condition been performed? There was a deposit of £50. made upon the landlord's agreeing to take Mrs. Williams as tenant, but the remainder of the money not having been paid, and Mrs. Williams not having entered into possession as tenant, the landlord subsequently withdrew his consent. I think it must be taken as if the landlord never has consented; and if so, the condition has not been performed. There would be nothing to bind the landlord unless there had been an actual transfer of the possession. The money was paid on a consideration which has failed, and therefore the plaintiff is entitled to recover it back, as money had and received to his use. The simple question is, whether the landlord's consent of the 19th of May was binding upon him? I think it was not, and therefore the condition was not performed. There must be no rule.

BOLLAND, B. The consent would have been sufficient if Mrs. Williams had acted upon it before it was withdrawn, by paying the remainder of the purchase-money, and getting into possession as tenant. As it was withdrawn before Mrs. Williams took possession as tenant, I think that the verdict was right.

ALDERSON, B. I think that the defendant never gave up possession to Mrs. Williams as tenant. He kept possession of the house for a very good reason; because the remainder of the purchase-money was not paid.

Rule refused.[5]

[5] In Wilkinson v. Lloyd (1845) L. R. 7 Q. B. 27, the plaintiff had purchased of the defendant certain shares in a public company, and had paid the purchase money to the defendant. The defendant on his part had executed the transfers: and nothing remained to be done but to obtain the consent of the directors that an entry of the transfer should be made in the books of the company. Owing to some disputes between the defendant and the directors, no consent could be obtained from the latter; and in consequence the transfer never was completed, and the plaintiff never was put into possession of

WHINCUP v. HUGHES.

(Court of Common Pleas, 1871. L. R. 6 C. P. 78.)

Action in the Salford Hundred Court against the defendant as executrix of Thomas Rogers Hughes, deceased.

The first count of the declaration stated that the testator covenanted with the plaintiff to instruct one George Whincup, the younger, during the term of six years, from the 31st of July, 1868, in the business of a watchmaker and jeweller. Breach, that he did not so instruct him.

Second count, for money had and received by the testator for the use of plaintiff, and for money had and received by the defendant as executrix, for the use of the plaintiff.

Third plea (inter alia) to the first count, that after the making of the said covenant, and after the said Thomas Rogers Hughes had for the space of twelve months instructed the said George Whincup, the younger, in his said business according to his said covenant, the said Thomas Rogers Hughes died, and was thereby prevented from any further performance of his said covenant.

To the rest of the declaration, never indebted.

Issues and demurrer to third plea.

At the trial the facts appeared to be as follows: The plaintiff had apprenticed his son to the defendant's testator, a watchmaker and jeweller, by a deed bearing date the 26th of November, 1868, for the term of six years, to be computed from the preceding 31st of July. The plaintiff covenanted to pay a premium of £25. to the master, and provide the apprentice with food and clothing during the term, in consideration whereof the master covenanted with the plaintiff to instruct the apprentice in his business, and to pay him wages accord-

the shares, and never became the legal owner of them. The plaintiff, without returning the transfers executed by the defendant, but which had been procured by the plaintiff, brought an action for money had and received to recover the amount paid by him. The court held for the plaintiff; Patteson, J., saying: "We think that the defendant was bound to procure the assent of the directors, and to do all that was necessary to invest the plaintiff with the property in the shares. The cases that have been decided with respect to the obligation upon the vendor of a lease to obtain the landlord's consent to an assignment where the lease requires it apply to this: the purchaser has a right to require the seller to give him the possession, or the means of obtaining the possession, of the thing purchased, or the consideration fails."

In Watson v. Donald (1908) 142 Ill. App. 110, Donald had contracted with the owner of a patent to form a corporation to introduce and promote the patented article. Donald then contracted with Watson to transfer to him a certain portion of the stock of such company, Watson paying Donald $500 in advance for such stock. The owner of the patent having repudiated his contract with Donald, Donald accepted that repudiation as an accomplished, although unwarranted, act by suing such party for breach of contract. The court allowed Watson to recover from Donald the $500.

See, also, Raney v. Boyd (1865) 39 Ill. 24.

One who enters into a contract for the purchase of land and makes a part payment of the purchase price may recover such payment if the vendor cannot make out title to the premises sold. Burroughs v. Skinner (1770) 5 Burr. 2639; Moore v. Williams (1889) 115 N. Y. 586, 22 N. E. 233, 5 L. R. A. 654, 12 Am. St. Rep. 844.

ing to an ascending scale, commencing at 4s. per week during the first year, and ending at 10s. per week in the last year of the term. The plaintiff paid the premium, and the apprentice was duly instructed up to the 14th of November, 1869, when the defendant's testator died.

The learned judge, upon these facts, held that the covenant to instruct the apprentice was a merely personal covenant, which was put an end to by the testator's death, and that the plaintiff could not, therefore, recover on the first count; but he held that the plaintiff might recover a part of the premium paid under the common counts, on the ground of failure of consideration. The verdict was thereupon entered for the plaintiff for the sum of £15. the amount found by the judge, to whom the question of amount was left by consent; leave being reserved to the defendant to move to enter a nonsuit, on the ground that neither the premium paid at the commencement of the apprenticeship, nor any part of it was recoverable back, the consideration for its payment not having failed, either wholly or as to any apportionable part.

A rule nisi was obtained by defendant.

Bovill, C. J.[6] This is an action brought to recover a part of the premium paid upon the execution of an apprenticeship deed, on the ground of failure of consideration. The general rule of law is, that where a contract has been in part performed no part of the money paid under such contract can be recovered back. There may be some cases of partial performance which form exceptions to this rule, as, for instance, if there were a contract to deliver ten sacks of wheat and six only were delivered, the price of the remaining four might be recovered back. But there the consideration is clearly severable. The general rule being what I have stated, is there anything in the present case to take it out of such rule? The master instructed the apprentice under the deed for the period of a year, and then died. It is clear law that the contract being of a personal nature, the death of the master, in the absence of any stipulation to the contrary, puts an end to it for the future. The further performance of it has been prevented by the act of God, and there is thus no breach of contract upon which any action will lie against the executor. That being so, can any action be maintained otherwise than upon the contract? The contract having been in part performed, it would seem that the general rule must apply unless the consideration be in its nature apportionable. I am at a loss to see on what principal such apportionment could be made. It could not properly be made with reference to the proportion which the period during which the apprentice was instructed bears to the whole term. In the early part of the term the teaching would be most onerous, and the services of the apprentice of little value; as time went on his services would probably be worth more, and he would require less teaching.

[6] The concurring opinions of Brett, Willes, and Montague Smith, JJ., are omitted.

There appears to be no instance of a similar nature to the present in which an action for the return of a part of the premium has been brought. There have been attempts to recover part of the premium in the case of articled clerks. In Ex parte Bayley, 9 B. & C. 691, which has been cited, the decision was not put on the ground of legal liability, but of the authority exercised by the Court over one of its own officers. In the case of Re Thompson, 1 Ex. 864, than which a stronger case could hardly exist, inasmuch as there the clerk died within a month after a premium of over £200. was paid, an application was made to the Court in the exercise of its summary jurisdiction, but they declined to order the return of any part of the premium. It was assumed in that case that no action at law could lie, for otherwise the application would have been unnecessary. Thus it appears that even on application to the extraordinary jurisdiction of the Court over its own officer, the Court of Exchequer deliberately came to the conclusion that neither in law nor in justice was there any right under such circumstances to a return of premium. With regard to the justice of such a case, it is clear that it would be almost impossible to estimate what the master might on his side have lost by the loss of the service of the apprentice. Again, the person receiving the premium naturally assumes that it becomes his property to be dealt with as he pleases; he is perfectly ready to perform his part of the contract; he never undertakes to return any part of the premium, and the necessity for such return is never contemplated.

We have been pressed with the authority of the case of Hirst v. Tolson, 2 Mac. & G. 134, 19 L. J. Ch. 441, where an attorney having died, the Lord Chancellor ordered the return of a part of the premium paid by an articled clerk. But this decision expressly proceeded on the supposition that such part of the premium would be a debt in law, although the Lord Chancellor came to the conclusion that under the circumstances it was not necessary to send the plaintiff to seek a remedy in a court of law, but he might recover in equity. The Lord Chancellor refers to the case of Stokes v. Twitchin, 8 Taunt. 492, as establishing the principle that where there is such a partial failure of consideration, an action is maintainable. On referring to that case it appears that it is no authority for any such proposition. In that case the indenture was void for breach of the provisions of a statute. The plaintiff claimed the whole premium back on the ground of total failure of consideration. There is no doubt that money had and received will lie upon such a failure of consideration, though the plaintiff failed in that case on the ground that he was himself party to the illegality.

With regard to the equity of the case, the Lord Chancellor refers to two former decisions in the time of Vernon and Finch, which appear to be Soam v. Bowden, Finch, 396, and Newton v. Rouse, 1 Vern. 460. On referring to the report of the former case in Finch, it appears that there the master had received a premium of £250. and died within two years, and a bill having been filed against the executors for the

return of a portion of the premium, it is stated that the executors said that they would be willing to do whatever the Court should direct in the matter. It is quite consistent with this report that the executors really did not contest the point, but submitted to what the Court might, under the circumstances, think just. The case of Newton v. Rouse, 1 Vern. 460, is certainly a very remarkable case, because there the agreement contained an express provision that in case of death £60. should be returned, and on a bill being filed, the Court decreed the return of £100. This is certainly wholly inconsistent with the principles regulating the interpretation of contracts both at law and equity. The only possible ground on which the decision can be explained is that mentioned by the note to the case in the 3rd ed. of Vernon, by Mr. Raithby, and referred to in 1 Story's Equity Jurisprudence (10th Ed.) p. 472, viz., that it must have been a case of mutual mistake, misrepresentation, or unconscientious advantage taken by one side of the other. Under these circumstances, it does not appear to me that the case of Hirst v. Tolson, 2 Mac. & G. 134, 19 L. J. Ch. 441, is a satisfactory authority or one by which we are bound. It appears to be based on a misapprehension of the law on the subject, and is distinctly contrary to the opinion of the Court of Exchequer in Re Thompson, 1 Ex. 864. For these reasons I think the rule ought to be made absolute.

Rule absolute.[7]

McCAMMON v. PECK.

(Circuit Court of Ohio, First Circuit, 1895. 9 Ohio Cir. Ct. R. 589.)

SWING, J. In the case of Coe v. Smith, 4 Ind. 79, 58 Am. Dec. 618, it is held: "When an attorney at law engages to defend a cause for a specified sum, and dies before the cause is determined, his administrator may recover from the client, upon a quantum meruit, the amount which the intestate's services were really worth to him. The recovery cannot, however, exceed the contract price, or the rate of it for the part of the service performed."

This case, it seems to us, is a very clear and satisfactory statement of the American law as applied to this class of contracts, and it is fully sustained by the following cases which we have examined: Hubbard v. Belden, 27 Vt. 645, Patrick v. Putnam, 27 Vt. 759, Lakeman v. Pollard, 43 Me. 463, 69 Am. Dec. 77, Hargrave v. Conroy, 19 N. J. Eq. 281, and others. In fact we find no recent American authority to be contrary. This holding is contrary to the leading English case of Cutter v. Powell;[8] but this latter case has always been criticised in this country. Kent said it "operated in some cases most unjustly," and

[7] See, also, Pinkham v. Libbey (1900) 93 Me. 575, 45 Atl. 823, 49 L. R. A. 693.

[8] Cutter v. Powell (1795) 6 Term R. 320, is printed at page 249, infra.

that it had been in some cases doubted and in others denied. Judge Story, in Brooks v. Byam, 2 Story, 525, Fed. Cas. No. 1,948, doubts whether it was correctly decided.

But we are unable to find any recent American text book or decision which adheres to the rule of Cutter v. Powell. And if as Kent says, it operates in some cases most unjustly, why should it be followed if a rule can be found to take its place which operates justly? Such a rule, it seems to us, is announced in the case of Coe v. Smith, supra. It is founded in right and justice. Coe had received valuable services, for which he had refused to pay, because he had not received the exact services for which he had contracted, but the contract had become impossible of performance by reason of the death of the other party, of course, by no fault of the other party. That Coe should pay for services actually received by him, under such circumstances, would seem to be nothing more than right.

The case at bar is not exactly this case, but the converse. But we are unable to see why the principle applicable should not be the same.

If McCammon had agreed to pay defendants $1,500 upon completion of the contract, and, after performing part, I. M. Jordan had died and McCammon had refused to pay any part, although admitting that services had been performed under the contract which was of the value of $250 to him, the case would be identical. What difference can it make in principle as to the rights of the parties whether McCammon had agreed to pay for certain work to be performed or had paid in advance for its performance? The reason of the law is that a person, having rendered service to another of the value of $250, should recover that amount, his death being in law a good excuse for the non-performance of the entire contract, but having received the whole consideration for the performance of the entire contract and then dying after only part performance, why should he retain the whole consideration when he had only given a part performance? Certainly it cannot be claimed that such a rule would have any foundation in right and justice. And we are unable to find any technical rule of law which requires the enforcement of such a law. All persons are presumed to contract with a view to death putting an end to contracts of this character, and the theory of the law is that death should work as little injury to either party as possible. It denies a right of action against the one dying for failure to perform and permits him to recover for the value of the services performed, although only a part of what he contracted to do. In the case at bar Jordan got paid in advance $1,500 for the performance of an entire contract. He dies, having performed a part of the admitted value of $250. Why should his death relieve him from damages for the non-performance of the contract and at the same time permit him to retain the whole considertion? There can be no presumption that he was to get it all if he died, any more than he was not to get any if he died, and we are unable to

see any reason why the rights of the parties should be different whether the money was paid or was to be paid.

The plaintiff, both upon authority and principle, is entitled to judgment on the pleadings.

The judgment of the superior court, sustaining demurrer to petition and overruling demurrer to answer of Mr. Jordan, will be reversed and cause remanded for further proceedings.[9]

CHANDLER v. WEBSTER.

(King's Bench Division. [1904] 1 K. B. 493.)

Appeal by the defendant, and cross-appeal by the plaintiff, from a judgment of Wright, J., in an action tried by him without a jury.

The action was brought by the plaintiff to recover a sum of £100. paid by him to the defendant as on a total failure of consideration, and the defendant counter-claimed for a sum of £41. 15s.

Wright, J., held that the plaintiff was not entitled to recover the £100. which he had paid, and that the defendant was not entitled to recover on the counter-claim.

COLLINS, M. R.[10] In this case the plaintiff agreed with the defendant for the hire of a room for the purpose of viewing the coronation procession. The price of the room was to be £141. 15s. The plaintiff paid £100. before the date fixed for the procession, leaving a balance of £41. 15s. unpaid. The procession did not take place. The plaintiff thereupon brought an action to recover the £100. which he had paid, and in that action the defendant counter-claimed for the unpaid balance of £41. 15s. The learned judge decided that both the claim and the counter-claim failed; that the plaintiff was not entitled to recover back the £100. paid by him, and the defendant was not entitled to be paid the balance of £41. 15s. Against this decision both the parties appeal, the defendant's appeal being the first in date. He contends that in the event which happened, having regard to the terms of the contract, he is entitled to the balance of £41. 15s. which the plaintiff has refused to pay him. I will deal with that appeal first.* The question appears really to depend upon the terms of the contract made by the parties. Contracts in these cases arising out of the postponement of the coronation have formed the subject of several decisions; and it has been held that, in cases where the doctrine of Taylor v. Caldwell, 3 B. & S. 826, applies, that is to say, where the parties have made no express stipulation that money paid for viewing the procession shall

[9] On appeal, the Supreme Court of Ohio (apparently without writing any opinion) reversed the judgment of the circuit court and affirmed the judgment of the trial court. Jordan v. McCammon, 56 Ohio St. 790, 49 N. E. 1111.

[10] The statement of facts is omitted, and the concurring opinions of Romer and Mathew, L. JJ., are omitted.

*Other cases discussing this question are printed at page 246 et seq., infra.

be returned in the event of no procession taking place, and where, under the circumstances of the contract, no condition to that effect can be implied, the result of the procession being prevented from taking place is that, the further performance of the contract having become impossible, the person who has paid his money in pursuance of it, on the footing of the contract being subsequently performed in full, must, nevertheless, abide the loss of what he has paid; and the person to whom a sum would have become payable on performance of the contract must also abide the loss, and cannot impose on the other party the obligation of paying that sum; in the event which has happened, the fulfilment of the contract having become impossible, both parties are relieved from further performance of it. The question is how the law so laid down is to be applied in the present case.

Dealing first with the defendant's counter-claim for the balance of £41. 15s., I think that, upon the authorities, it is clear that the defendant has a right to recover that balance, if the contract was that the price of the room should be paid before the time at which the procession became impossible. A person who has agreed to pay a sum of money cannot be in a better position by reason of his having failed to perform his obligation to pay it at the time when he ought to have done so, than that which he would have occupied if he had paid the money in accordance with the contract. If that be so, the question which we have to consider is whether the contract entered into bound the plaintiff to pay the price of the room before the date at which the procession became impossible. In my opinion it did so bind him, and it was not a condition precedent to his obligation to pay the money that the procession should take place. The terms of the contract are to be gathered from the correspondence between the parties. I need not refer to it in detail. It appears to me to be clear upon the correspondence that the understanding was that the £141. 15s. for the use of the room was to be paid, either immediately, or, at any rate, as soon as possible after the making of the contract, and certainly before the date when the procession became impossible. The defendant repeatedly asserts in his letters that the money has become payable; and I do not find that the plaintiff substantially disputes that assertion in his answers further than by qualifying it to the extent of saying that there was no absolute bargain that the price should be paid down in cash immediately after the making of the contract; but I think that his qualification really amounts to an admission that it was payable before the time at which the procession became impossible.

Great reliance was placed by the plaintiff's counsel upon the letter of June 10, upon which Wright, J., decided the case, but it appears to me that that letter is really a clear admission by the plaintiff that the obligation to pay the money had already accrued. On that letter Wright, J., seems to have come to the conclusion that the happening of the procession was made a condition precedent to the liability of the plaintiff to pay, and therefore that, as to the balance of £41. 15s.,

the plaintiff was not liable. For the reasons I have already given I do not think that was the true effect of the original contract, and the letter of June 10 appears to me to begin with a clear admission that the whole amount of £141. 15s. was then due, and then to suggest, merely by way of indulgence to the plaintiff, that an opportunity should be given him of raising the money by letting seats in the room for the procession, without any waiver of the rights of the defendant under the original contract.[11] That being so, in my opinion the application of the law, as established by the authorities which have been cited, to this case is clear. The fulfilment of the contract having become impossible through no fault of either party, the law leaves the parties where they were, and relieves them both from further performance of the contract. Therefore, if by the contract the obligation to pay for the room did not arise until after the procession had taken place, then, the obligation being based on the happening of the procession, which has become impossible, the hirer is relieved from that obligation; but if by the contract the obligation to pay for the room had accrued before the procession became impossible, the hirer, if he has paid, cannot get his money back, and, if he has not paid, is still liable to pay. That being so, it appears to me that the defendant is entitled to succeed on the counter-claim.

Then, with regard to the plaintiff's claim for a return of the £100., to a very considerable extent I have already dealt incidentally with the considerations which apply to that claim. The plaintiff contends that he is entitled to recover the money which he has paid on the ground that there has been a total failure of consideration. He says that the condition on which he paid the money was that the procession should take place, and that, as it did not take place, there has been a total failure of consideration. That contention does no doubt raise a question of some difficulty, and one which has perplexed the Courts to a considerable extent in several cases. The principle on which it has been dealt with is that which was applied in Taylor v. Caldwell, 3 B. & S. 826,—namely, that, where, from causes outside the volition of the parties, something which was the basis of, or essential to the fulfilment of, the contract, has become impossible, so that, from the time when the fact of that impossibility has been ascertained, the contract can no further be performed by either party, it remains a perfectly good contract up to that point, and everything previously done in pursuance of it must be treated as rightly done, but the parties are both discharged from further performance of it. If the effect were that the contract

[11] The plaintiff's letter to defendant under date of June 10, 1902, was as follows: "I beg to confirm my purchase of the first-floor room of the Electric Lighting Board at 7, Pall Mall, to view the procession on Thursday, June 26, for the sum of £141. 15s., which amount is now due. I shall be obliged if you will take the room on sale, and I authorize you to sell separate seats in the room for which I will erect a stand. If the seats thus sold in the ordinary way or business do not realize the above amount by June 26, I agree to pay you the balance to make up such amount of £141. 15s."

were wiped out altogether, no doubt the result would be that money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply.

The rule adopted by the Courts in such cases is I think to some extent an arbitrary one, the reason for its adoption being that it is really impossible in such cases to work out with any certainty what the rights of the parties in the event which has happened should be. Time has elapsed, and the position of both parties may have been more or less altered, and it is impossible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats everything that has already been done in pursuance of the contract as validly done, but relieves the parties of further responsibility under it. In the case of Blakely v. Muller & Co., [1903] 2 K. B. 760, Wills, J., in giving judgment made some valuable observations on this point. He said, with regard to the decision in Appleby v. Myers, L. R. 2 C. P. 651*: "That decision is, in my opinion, distinctly in point. The argument for the plaintiffs must be that the contract was rescinded ab initio. There is no authority to warrant that contention, and I cannot think it is well founded. The process of constructing a hypothetical contract by supposing what terms the parties would have arrived at if they had contemplated the possibility of what was going to happen is, to my mind, very unsatisfactory. It is very difficult to construct such a contract for them. Probably, in the present case, the defendants would have stipulated for compensation for their outlay, and the plaintiffs for a return of their money; but it is impossible to say with any certainty what the result of their bargaining would have been." It seems to me that he there points out the reason why the Courts have been obliged to stop short where they have, namely, at the position of the parties when the further performance of the contract was excused for both, and why they have felt themselves constrained to adopt what appears to be a more or less arbitrary rule on the subject.

I think the same principle has been adopted by the decision of this Court in Civil Service Co-operative Society v. General Steam Navigation Co., [1903] 2 K. B. 756, at p. 764, where the Lord Chancellor approved of a passage from the judgment of Channell, J., in the case of Blakely v. Muller & Co., [1903] 2 K. B. 760, at p. 762.[12] In that pas-

*See note, page 267, for a brief statement of Appleby v. Myers.

[12] In the case of Blakely v. Muller & Co., [1903] 2 K. B. 760, note, Channell, J., said: "If the money was payable on some day subsequent to the abandonment of the procession, I do not think it could have been sued for. If, however, it was payable prior to the abandonment of the procession, the position would be the same as if it had been actually paid and could not be recovered back and it could be sued for. All Taylor v. Caldwell says is that the parties are to be excused from the performance of the contract, and Appleby v. Myers says from the further performance. It is impossible to import a condition into a contract which the parties could have imported and have not done so. All that can be said is that, when the procession was abandoned, the contract was off, not that anything done under the contract was void. The loss must

sage the learned judge supports what I have already said, namely, that, where the doctrine of Taylor v. Caldwell, 3 B. & S. 826, and Appleby v. Myers, L. R. 2 C. P. 651, applies, the result is that the law leaves the parties where they were when the further performance of the contract became impossible. It treats the contract as a good and subsisting contract with regard to things done and rights accrued in accordance with it up to that time; but, as the basis of the contract has failed, it excuses the parties from further responsibility under it. For these reasons I think the judgment was right as to the claim, but wrong as to the counter-claim. The appeal must therefore be allowed and the cross-appeal disallowed.

II. By Plaintiff

HOLLIDAY v. COE.

(Supreme Court of Judicature of Indiana, 1851. 3 Ind. 26.)

Error to the Fountain Circuit Court.

Blackford, J. This was an action of assumpsit brought by Coe against Holliday. Plea, the general issue. The cause was submitted to a jury. Verdict for the plaintiff for $222. Motion for a new trial overruled, and judgment on the verdict.

The declaration, originally, contained six counts. Two of them were adjudged, on general demurrer, to be bad, and need be no further noticed. The remaining counts are general ones for work and labor, and for money paid.

The facts are as follows:

In 1846, the plaintiff, Coe, undertook to transport, for Holliday, the defendant, a certain quantity of corn from Fountain county, in this state, to New Orleans, in Louisiana. The following bill of lading shows the contract between the parties:

"Covington, Fountain county, Ia., May 15th, 1846. Shipped by Daniel T. Holliday, in good order and condition, on board the good flatboat called the Queen-City, No. 3, whereof Milburn Coe is owner, and Samuel Welch is pilot, for the present voyage, now lying in the port of Covington and bound for New Orleans, the following property marked and consigned as below, which is to be delivered without delay, in like good order, at the port aforesaid, the unavoidable dangers of the river navigation or fire excepted, unto M. R. or A. S. Holliday,

remain where it was at the time of the abandonment. It is like the case of a charter party where the freight is payable in advance, and the voyage is not completed, and the freight therefore not earned. Where the non-completion arose through impossibility of performance the freight could not be recovered back. Of course, if the contract for seats had been made subsequent to the abandonment of the procession, that would be different altogether. There the money could be recovered."

or to his or their assigns, he or they paying freight for the said property at the rate of sixteen cents per bushel.

"In witness whereof, the owner of said boat has affirmed to three bills of lading of this tenor and date, one of which being accomplished, the others to stand void.

"On account of D. T. Holliday, Covington, Ia., Property, 3,771 bushels of corn in the ear, at 16 cents, $603.36. Consignees, M. R. or A. S. Holliday.

"Received on the above ft. of D. T. Holliday, $75.64. (Bal.) $527.-72. [Signed] Milburn Coe."

The defendant's advance of $75.64, mentioned above, was to pay incidental expenses, such as the expense of a protest should one be necessary. The defendant had the corn insured at 20 cents a bushel.

The plaintiff, in pursuance of his contract contained in the bill of lading, proceeded on the voyage with his boat and the aforesaid cargo, until the boat, when within about 250 miles of New Orleans, sunk, and the whole cargo was lost. Immediately after the loss, the plaintiff went to New Orleans, and procured, at an expense of about fifteen dollars, a protest of the boat. Afterwards, the defendant told one of the witnesses he would pay the plaintiff a part of the freight, but the plaintiff was not then present, nor did the witness understand the defendant as contracting to make such payment. The insurance on the corn was paid by the insurers.

These facts do not, in our opinion, support the verdict for the plaintiff. The claim of the plaintiff, under the counts for work and labor, is for freight in transporting the corn under the contract between the parties, as evidenced by the bill of lading. But it is very clear that the plaintiff has no ground for the recovery of freight. The answer to his claim for freight is, that the corn was not delivered by him at New Orleans; his delivery of it there being a precedent condition to be performed by him. The sinking of the boat and consequent loss of the cargo, before the arrival at the place of destination, show that no freight is recoverable in this case. The circumstance that the plaintiff performed a part of the voyage, and that the loss occurred without any fault on his part, does not authorize the verdict. There are no doubt cases where freight must be paid, pro rata itineris. Thoses cases are where the vessel has performed the whole voyage, and brought only a part of her cargo to the place of destination; or where the vessel has not performed her whole voyage, and the goods have been delivered to the merchant at a place short of the place of delivery. The case before us does not come within either of those classes. Here was an entire loss of the cargo where the boat was sunk, and, of course, the case is not one where freight can be recovered according to the proportion of the voyage performed. 3 Kent's Comm. 219, 227.

There was no evidence to support the count for money paid. It is true that the plaintiff paid a small sum for the protest at New Orleans, but the evidence shows that he was bound to pay that out of

the money which has been advanced to him, on the freight by the defendant.

The evidence of the defendant's statement after the loss, that he would pay part of the freight, was made to a stranger, in the plaintiff's absence, and the defendant was not understood as contracting to make such payment. That evidence does not support this suit.

PER CURIAM. The judgment is reversed and the verdict set aside with costs. Cause remanded, &c.[18]

[18] "The contract for the conveyance of merchandise is in its nature an entire contract, and unless it be completely performed by the delivery of the goods at the place of destination, the merchant will in general derive no benefit from the time and labour expended in a partial conveyance, and consequently be subject to no payment whatever, although the ship may have been hired by the month or week. The cases in which a partial payment may be claimed, are exceptions to the general rule, founded upon principles of equity and justice, as applicable to particular circumstances." Abbott on Shipping (14th Ed.) p. 657.

Among such exceptional situations are the following: Pro rata freight may be recovered where a part of the goods shipped have been delivered, but the shipper may recoup any damages suffered by reason of failure to carry or deliver the rest of the cargo or consignment. Taylor v. The Marcella (1873) 1 Woods, 302, Fed. Cas. No. 13,797; Edward Hines Lumber Co. v. Chamberlain (1902) 118 Fed. 716, 55 C. C. A. 236. So, also, pro rata freight may be recovered if the owner voluntarily takes his goods at an intermediate port. Robinson v. Marine Insurance Co. (1807) 2 Johns. (N. Y.) 323; British & Foreign Marine Insurance Co. v. Southern Pacific Co. (D. C. 1893) 55 Fed. 82. But if the master refuses to transport the goods to their destination, the owner who retakes them at the intermediate port is not liable for pro rata freight as such a taking by the owner is not deemed voluntary, but compulsory. Adams v. Haught (1855) 14 Tex. 243; Welch v. Hicks (1826) 6 Cow. (N. Y.) 505, 16 Am. Dec. 443. No pro rata freight can be recovered if the goods are brought back to the port from which they started, because of damage to the vessel. Lord v. Neptune Ins. Co. (1857) 10 Gray (Mass.) 109. Nor if the goods are brought back because of a blockade of the port of destination. Scott v. Libby (1807) 2 Johns. (N. Y.) 336, 3 Am. Dec. 431. If the owner takes possession of the goods short of their destination, the carrier not being in default, full freight is due. Braithwaite v. Power et al. (1891) 1 N. D. 455, 48 N. W. 354. An agreement that full freight should be paid, whether or not the goods reach their destination, is valid and enforceable. The Queensmore (1893) 53 Fed. 1022, 4 C. C. A. 157; Portland Flouring Mills Co. v. British & Foreign Marine Insurance Co. (1904) 130 Fed. 860, 65 C. C. A. 344.

FREIGHT THE MOTHER OF WAGES.—A seaman's right to recover wages was dependent upon the earning of freight by the vessel on which he shipped. Thus if the vessel was lost or captured before the termination of the voyage no right to wages accrued. Abernethy v. Landale (1780) 2 Doug. 539. See, also, Anonymous (1683) 2 Show. 283, page 233, supra.

By statute a seaman may now recover pro rata wages in such case. 57 & 58 Vict. c. 60, § 158; Rev. St. U. S. §§ 4525, 4526 (U. S. Comp. St. 1913, §§ 8316, 8317). ("No right to wages shall be dependent on the earning of freight by the vessel.")

CUTTER v. POWELL.

(Court of King's Bench, 1795. 6 Term R. [Durnford & East] 320.)

To assumpsit for work and labour done by the intestate, the defendant pleaded the general issue. And at the trial at Lancaster the jury found a verdict for the plaintiff for £31. 10s. subject to the opinion of this Court on the following case:

The defendant being at Jamaica subscribed and delivered to T. Cutter the intestate a note, whereof the following is a copy; "Ten days after the ship 'Governor Parry,' myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of thirty guineas, provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool. Kingston, July 31st, 1793." The ship "Governor Parry" sailed from Kingston on the 2d of August, 1793, and arrived in the port of Liverpool on the 9th of October following. T. Cutter went on board the ship on the 31st of July, 1793, and sailed in her on the 2d day of August, and proceeded, continued and did his duty as second mate in her from Kingston until his death, which happened on the 20th of September following, and before the ship's arrival in the port of Liverpool. The usual wages of a second mate of a ship on such a voyage, when shipped by the month out and home is £4. per month: but when seamen are shipped by the run from Jamaica to England, a gross sum is usually given. The usual length of a voyage from Jamaica to Liverpool is about eight weeks.

This was argued last term by J. Haywood for the plaintiff; but the Court desired the case to stand over, that inquiries might be made relative to the usage in the commercial world on these kinds of agreements. It now appeared that there was no fixed settled usage one way or the other: but several instances were mentioned as having happened within these two years, in some of which the merchants had paid the whole wages under circumstances similar to the present, and in others a proportionable part. The case was now again argued.

LORD KENYON, Ch. J.[14] I should be extremely sorry that in the decision of this case we should determine against what had been the received opinion in the mercantile world on contracts of this kind, because it is of great importance that the laws by which the contracts of so numerous and so useful body of men as the sailors are supposed to be guided should not be overturned. Whether these kind of notes are much in use among the seamen, we are not sufficiently informed; and the instances now stated to us from Liverpool are too recent to form any thing like usage. But it seems to me at present that the decision of this case may proceed on the particular words of this contract and the precise facts here stated, without touching ma-

[14] The concurring opinions of Grose and Lawrence, JJ., are omitted.

rine contracts in general. That where the parties have come to an express contract none can be implied has prevailed so long as to be reduced to an axiom in the law. Here the defendant expressly promised to pay the intestate thirty guineas, provided he proceeded, continued and did his duty as second mate in the ship from Jamaica to Liverpool; and the accompanying circumstances disclosed in the case are that the common rate of wages is four pounds per month, when the party is paid in proportion to the time he serves: and that this voyage is generally performed in two months. Therefore if there had been no contract between these parties, all that the intestate could have recovered on a quantum meruit for the voyage would have been £8.; whereas here the defendant contracted to pay thirty guineas provided the mate continued to do his duty as mate during the whole voyage, in which case the latter would have received nearly four times as much as if he were paid for the number of months he served. He stipulated to receive the larger sum if the whole duty were performed, and nothing unless the whole of that duty were performed: it was a kind of insurance. On this particular contract my opinion is formed at present; at the same time I must say that if we were assured that these notes are in universal use, and that the commercial world have received and acted upon them in a different sense, I should give up my own opinion.

ASHHURST, J. We cannot collect that there is any custom prevailing among merchants on these contracts; and therefore we have nothing to guide us but the terms of the contract itself. This is a written contract, and it speaks for itself. And as it is entire, and as the defendant's promise depends on a condition precedent to be performed by the other party, the condition must be performed before the other party is entitled to receive any thing under it. It has been argued however that the plaintiff may now recover on a quantum meruit: but she has no right to desert the agreement; for wherever there is an express contract the parties must be guided by it; and one party cannot relinquish or abide by it as it may suit his advantage. Here the intestate was by the terms of his contract to perform a given duty before he could call upon the defendant to pay him anything; it was a condition precedent, without performing which the defendant is not liable. And that seems to me to conclude the question: the intestate did not perform the contract on his part; he was not indeed to blame for not doing it; but still as this was a condition precedent, and as he did not perform it, his representative is not entitled to recover.

Postea to the defendant, unless some other information relative to the usage in cases of this kind should be laid before the court before the end of this term; but the case was not mentioned again.[15]

[15] In Appleby v. Dods (1807) 8 East, 300, the plaintiff, a sailor, shipped on board the defendant's ship from London for Madeira, the West Indies, and return. The vessel was lost on the return voyage from the West Indies.

WOLFE v. HOWES.

(Court of Appeals of New York, 1859. 20 N. Y. 197, 75 Am. Dec. 388.)

Appeal from the Supreme Court. The complaint contained the common counts only for work, labor and services done by Nicholas Vache, the testator, for the defendants. The defendants denied the facts averred in the complaint, and set up as a separate defence that the work was done under a special contract not performed by Vache in his lifetime, and claimed damages for the breach of the contract on his part. The defendants had for nine years previous to May, 1852, been engaged as partners in carrying on the business of making glass at the Dunbarton glass-works, of which they were the proprietors, at Verona in the county of Oneida. The testator was in the employment of the defendants at their glass-works as a pot-maker. On the 1st of May, 1852, the defendants and testator entered into a contract in writing as follows:

"Memorandum of an agreement made this day. Howes, Scofield & Co. [defendants], of the first part, and Nicholas Vache of the second part, witnesseth, That for and in consideration of $1 to me in hand paid, the receipt whereof I do acknowledge, do agree on my part to do all the pot-room work for said parties of the first part, in a good and workmanlike manner, for one year from the date of this contract, at the price of $40 per month, $10 of which is to be paid me monthly. Dunbarton, May 1st, 1852. If extra help is needed, we agree to furnish it. [Signed] Nicholas Vache."

The trial was before a referee, who found the following facts: The plaintiff's testator entered upon the performance of the contract, and continued to fulfill it in all respects according to the terms thereof, in a good and workmanlike manner from the 1st day of May, 1852, to the 7th day of December, following, when Vache became sick and unwell, and so continued for a long time, and at length died. By reason of his said sickness, and without fault on his part, he became and was incapable of further performance of his said contract.

Plaintiff brought assumpsit for wages, claiming that since the voyage was divided into three parts, first to Madeira, next to the West Indies, and then home, and since freight, which is called the mother of wages, had thus been earned in the two first stages of the voyage, he was entitled to recover his wages up to the time the ship sailed for home from the West Indies, but the court denied all recovery and gave judgment for the defendant; Lord Ellenborough, C. J., saying: "The terms of the contract in question are quite clear and reasonable; they relate to a voyage out to Madeira and any of the West India Islands, and to return to London; and there is an express stipulation "that no seaman shall demand or be entitled to his wages, or any part thereof, until the arrival of the ship at the above-mentioned port of discharge," &c., which must refer to London. And though the reason of this stipuation was, no doubt, to oblige the mariners to return home with the ship, and not to desert her in the West Indies; yet the terms of it are general, and include the present case: and we cannot say, against the express contract of the parties, that the seamen shall recover pro rata, although the ship never did reach her port of discharge named."

He held as matter of law, that by reason of his sickness and death, Vache was released and discharged from the further performance of his contract, and his executor was entitled to recover a reasonable compensation for the services of his testator.

That such reasonable compensation was the sum of $40 per month, for the time of the testator's service; and after deducting certain payments made to him from time to time, there was a balance due of $159.28, for which he ordered judgment with costs. The defendants took several exceptions to the finding of the facts and the decisions of the referee on the questions of law, and particularly to the conclusion that Vache was released and discharged from further performance of the contract, and that the plaintiff was entitled to recover a reasonable compensation for the services rendered by his testator for the defendants, and in not allowing a sufficient amount of set-off. The Supreme Court, at general term in the fifth district, having affirmed the judgment entered on the report of the referee, the defendants appealed to this court.

ALLEN, J. There can be little doubt, I think, that the contract with Vache contemplated his personal services. This is evident, both from the nature of the business and the amount of compensation agreed to be paid him. It is also manifest from the evidence on both sides. The business of pot-making required skill and experience. It was an art to be acquired after much study and labor, and which Vache seemed to have accomplished. The execution of the work required his constant and personal supervision and labor. No common laborer could have supplied his place, and hence the amount of his wages was largely increased beyond that of such a hand. The extra help mentioned in the contract had reference to the breaking away of the flattening, so called, and to its repair, and nothing else. The whole testimony shows this, as well as that the personal services of Vache were contracted for. The referee, therefore, well found and the court below well decided that such were the terms of the contract.

2. The question is then presented whether the executor of a mechanic, who has contracted to work for a definite period, and who enters upon his labors under the contract, and continues in its faithful performance for a portion of the time, until prevented by sickness and death, and without any fault on his part, from its final completion, can recover for the work and services thus performed by his testator.

The broad ground is taken on the part of the defendants' counsel, that no recovery can be had under such circumstances; that full performance was a condition precedent to the right of recovery, the agreement being general and absolute in its terms, and not providing for the contingency of sickness or death.

It has undoubtedly been long settled as a general principle, both in England and in this as well as in most the other States, that where

the contract is entire, nothing but the default of the defendants will excuse performance. It will be found, however, on an examination of the leading cases in our own courts, that the failure to perform was owing to the fault or negligence of the party seeking to recover. McMillan v. Vanderlip, 12 Johns. 165, 7 Am. Dec. 299; Reab v. Moor, 19 Johns. 337; Jennings v. Camp, 13 Johns. 94, 7 Am. Dec. 367; Webb v. Duckingfield, 13 Johns. 390, 7 Am. Dec. 388; Sickels v. Pattison, 14 Wend. 257, 28 Am. Dec. 527; Lantry v. Parks, 8 Cow. 63, and various other cases. It is believed that not a single case can be found where the rule is laid down with such strictness and severity as the defendants' counsel asks for in the present case.

Some of the English cases do indeed rather intimate such a doctrine. Cutter v. Powell, 6 T. R. 320; 8 id. 267; Appleby v. Dods, 8 East, 300; Hulle v. Heightman, 2 id. 145, and some others. These cases are, however, capable of the same reasonable construction which the law confers upon all contracts. That of Cutter v. Powell is distinguishable in this, that by the peculiar wording of the contract it was converted into a wagering agreement, by which the party, in consideration of an unusually high rate of wages, undertook to insure his own life and to render at all hazards his personal services during the voyage, before the completion of which he died.

The great principle upon which the adjudged cases in all the courts is based is the question, as stated in McMillan v. Vanderlip, already cited. What was the real intention of the parties? The law gives a reasonable construction to all contracts. For instance, in the present case, did the parties intend that the contract should be binding upon the plaintiff's testator in case of unavoidable sickness or death; or did they intend, and is it to be implied, that each should perform, as to the other, according to the terms of the contract, Deo volente? It appears that a fair and legal interpretation would answer this question in the affirmative, and that such a provision must be understood as written in the contract. Nor is this principle wanting sanction either by elementary writers or adjudged cases. "Where the performance of a condition is prevented by the act of God, it is excused." Cruise's Dig., Condition, 41, 43; 3 Kent's Com. 471; 2 id. 509; 8 Bing. 231. In Mounsey v. Drake, 10 Johns. 27, 29, the court say: "Performance must be shown, unless prevented by the act of God, or of the law." 1 Shep. Touchstone, 180; Gilbert on Covenants, 472; People v. Manning, 8 Cow. 297, 18 Am. Dec. 451; People v. Bartlett, 3 Hill, 570; Carpenter v. Stevens, 12 Wend. 590; Chit. on Cont. 631; 1 Pars. on Cont. 524, and note; Fenton v. Clark, 11 Vt. 562; Fuller v. Brown, 11 Metc. (Mass.) 440.

There is good reason for the distinction which seems to obtain in all the cases, between the case of a willful or negligent violation of a contract and that where one is prevented by the act of God. In the one case, the application of the rule operates as a punishment to the per-

son wantonly guilty of the breach, and tends to preserve the contract inviolable; while, in the other, its exception is calculated to protect the rights of the unfortunate and honest man who is providentially and without fault on his part prevented from a full performance.

There is another reason for relaxing the rule, which is applicable to the case we are now considering. It is well set forth in Story on Bailments, § 36, and notes, where that learned jurist, after considering the great number of cases on this subject in the various courts of England and this country, and well observing that they are not at all times in harmony, remarks that the true rule may be considered to be, "that where the contract is for personal services which none but the promisor can perform, there inevitable accident or the act of God will excuse the non-performance, and enable the party to recover upon a quantum meruit. But where the thing to be done or work to be performed may be done by another person, then all accidents are at the risk of the promisor." In the present case the finding shows, and I have already remarked, justly, that the contract was personal, and that the executor could not have employed a third person to execute the contract on the part of his testator Vache.

But without pressing this point further, it is sufficient to say that it was virtually decided against the defendants by this court in the case of Jones v. Judd, 4 N. Y. 411. It was there decided that when, by the terms of the contract for work and labor, the full price is not to be paid until the completion of the work, and that becomes impossible by the act of the law, the contractor is entitled to recover for the amount of his labor. In that case the work was stopped by the State officers in obedience to an act of the Legislature suspending the work; and the court held that as the contractor was without fault, he was entitled to recover. The case in 10 Johns. 27, before cited, was referred to and approved of as authority in favor of the position; and see Beebe v. Johnson, 19 Wend. 502, 32 Am. Dec. 518.

The conclusion, then, is, that where the performance of work and labor is a condition precedent to entitle the party to recover a fulfillment must be shown; yet that where performance is prevented or rendered impossible by the sickness or death of the party, a recovery may be had for the labor actually done. This is not out of harmony with principle or adjudged cases, and is certainly in harmony with the rules of common honesty and strict justice.

These views dispose of the main questions in the case. It is necessary to notice one or two of minor importance.

It is insisted that if sickness were an excuse for the non-performance of the contract on the part of Vache, that such excuse should have been alleged in the complaint, and this not having been done, that the plaintiff is not entitled to recover. It is true that the plaintiff might have set up the agreement and the excuse for its nonperformance, and entitled himself to recover upon such a pleading. But the complaint pro-

ceeds upon a quantum meruit; and upon showing the work and labor of Vache the plaintiff entitled himself to recover. The defendants set up the special agreement as matter of defense, and the plaintiff's excuse was properly enough matter of reply. The contract was in fact discharged by the act of God, and its chief consequence was to measure the amount of the plaintiff's damages, or to regulate the compensation to which the plaintiff was entitled, though his remedy was as upon a quantum meruit. So say some of the cases already cited.

Again, it is said that if the plaintiff was entitled to recover any thing, it could be only $10 a month, and that the defendants' set-off having been found by the referee to amount to more than that, the defendants were entitled to judgment. This objection is not tenable. The compensation was to be at the rate of $40 per month; $10 (a part) of which was to be paid monthly. This was upon the supposition that the contract was to be performed for the whole time. This, however, having been rendered impossible, the plaintiff was entitled to recover, if any thing, the full value of the services of the testator, not exceeding the rate of compensation secured by the terms of the contract.

It is further urged that the referee erred in not allowing defendants' damages accruing to them after Vache was sick and before he quit. That was a question of fact entirely for the referee. He found that the plaintiff did his work well and skillfully, down to the time of his sickness; he allowed and deducted the whole amount of set-off proved by defendants; and he does not find that the defendants sustained any damages by reason of any defect in Vache's work down to the time of his quitting, in December, 1852. With these questions of fact we cannot interfere. The court below sanctioned the finding. I think they were fully warranted in so doing. At all events, we are not at liberty to interfere.

The judgment must be affirmed. Judgment affirmed.[16]

[16] See, to the same effect, Coe v. Smith (1853) 4 Ind. 79, 58 Am. Dec. 618, stated at length in McCammon v. Peck, page 240, supra.

In Lakeman v. Pollard (1857) 43 Me. 463, 69 Am. Dec. 77, plaintiff was hired to work in defendant's mill during the sawing season, but quit work owing to a reasonable fear (as the jury found) occasioned by an epidemic of cholera in the vicinity. Held that his breach of his contract was excusable and that he might therefore recover a reasonable compensation for the labor performed by him.

In Walsh v. Fisher (1899) 102 Wis. 172, 78 N. W. 437, 43 L. R. A. 810, 72 Am. St. Rep. 865, plaintiff, who was under contract to work for defendant during the season, after part performance was deterred from continuing owing to a reasonable fear of violence from strikers. Held that he might recover "compensation for the actual benefit conferred upon the employer, or, as more usually expressed, by allowing the employee the value of his services after deducting the damages, if any, suffered by the employer by reason of the breach of the entire contract."

In Whitfield v. Zellnor (1852) 24 Miss. 663, plaintiff having contracted with defendant to erect a mill and milldam on defendant's land, was prevented from completing his contract by an injunction sued out by a third party. The court held that plaintiff was excused from further performance of his contract and could recover for the value of the work done by him. But in Sauer v. School District of McKees Rocks Borough (1914) 243 Pa. 294, 90 Atl. 150,

PATRICK v. PUTNAM.

(Supreme Court of Vermont, 1855. 27 Vt. 759.)

Book account. The county court, March Term, 1855, Poland, J., presiding, rendered judgment upon the report in favor of the plaintiff for the amount allowed by the auditor, to which the defendant excepted.

REDFIELD, Ch. J.[17] The only question made in the present case is whether a person contracting to labor for a definite term and who fails to fulfill his contract, by reason of sickness, is liable to have the amount of his recovery reduced, by the damages sustained by the employer, in consequence of his not being able to complete the full term of service.

It is certain that in most analogous cases, where one is allowed to recover for part performance of an entire contract, unless hindered in the performance of his contract, by the other party, or excused by such party, he is liable to such deduction. He is allowed to recover only what his services have benefited the other party, as compared with full performance. The other party is not liable to divide the loss sustained by the innocent misfortune even of the plaintiff. This is so held in the case of clearing land, building wall and other erections, upon the land of the employer, as decided in the cases cited in argument.

So too, an infant even, who is of course not bound to full performance of his contract, and who may abandon it, at any time, and recover upon a quantum meruit, is still held liable to have deducted from his wages, any damages his employer may have sustained, in consequence of not serving the full term stipulated. Thomas v. Dike, 11 Vt. 273, 34 Am. Dec. 690, and subsequent cases.

The English rule, at the present day, will not allow a recovery in a case like the present. The rule, in regard to the necessity of strict performance of such a contract of service, was first relaxed, in this state, in the case of Fenton v. Clark, 11 Vt. 557. And Bennett, J., in the opinion in that case, thus explicitly lays down the ground, upon which the recovery, in such a case, should be had. "It is not the object of the law to punish the party for a violation of his contract, but to make the other party good for all damages he may sustain, by such violation. Common justice required the plaintiff should have been

it was held that action would lie on the contract in such case, the measure of damages being the contract price less the cost of completing the work.

In Jennings v. Lyons (1876) 39 Wis. 553, 20 Am. Rep. 57, the plaintiffs, man and wife, contracted with defendant to render services for one year, he upon the farm, she in the house. Four months thereafter the wife had to abandon her work in anticipation of her confinement which occurred soon after. The court denied any recovery for the part performance, on the ground that the plaintiffs, being aware of the impending incapacity of the wife to perform her work, should have provided against it in the contract. But see Stolle v. Stuart (1908) 21 S. D. 643, 114 N. W. 1007.

[17] The statement of facts is omitted.

allowed to recover so much as the defendant has been benefited by the labor, after deducting any damages he may have sustained by reason of the violation of the contract."

This we understand to have been the sole ground upon which any relaxation was made upon this subject. And although I have always thought the strict rule of the English law, upon the subject the most salutary, both for employers and employed, inasmuch as it removes all temptation to make feigned excuses, and speculation upon the necessities of others, to falsehood and dishonesty, which are generally a far greater loss to those who are seduced into the practice of them, than to those who are the objects of such practices, and sooner or later are likely to return to plague the inventors; still I have, for the reasons, then assigned, become somewhat reconciled to the apparent equity of the rule then laid down. And we accordingly so decided a case, in the last county, upon the present circuit, which seems to have been in principle, precisely like the present. We are quite agreed that no further relaxation is allowable. A party who is thus excused from the performance of his contract, has no reason to complain, that he is only allowed to recover for part performance, what his services have benefited the other party, with reference to full performance.

The fact that plaintiff's sickness was, in this case, contracted in some occasional work, which he consented to do, beyond the limits of his employment, will not affect the legal or equitable rights of the parties, in court, however it might be in the forum of conscience, where this court does not attempt to decide. Judgment reversed and judgment for defendant.[18]

[18] In McClellan v. Harris (1895) 7 S. D. 447, 64 N. W. 522, plaintiff contracted to serve defendant as a farm laborer, but owing to illness was forced to stop work before the expiration of the stipulated time. He brought action for the value of his services, and defendant sought to recoup a still larger sum as damages occasioned by plaintiff's failure to complete his contract. The court ruled against the defendant's claim for recoupment saying: "Contracts to perform personal labor are considered as made on the implied condition that the employee shall be alive and capable of performing the contract; and inability to work, produced by unavoidable necessity, constitutes an excuse for not laboring, and he is entitled to recover reasonable pay for services performed. * * * We characterize as unjust and reject as unreasonable, the inculcation of a doctrine which would defeat a recovery in the case before us."

But see Walsh v. Fisher, supra, 255, note.

JONES v. JUDD.

(Court of Appeals of New York, 1850. 4 N. Y. 411.)

James Jones and Edward Jones sued Judd in the common pleas of Cattaraugus county, for the price of work and labor. The defendant contracted with the state to complete certain sections of the Genesee Valley Canal. On the 14th of September, 1840, he entered into a subcontract with the plaintiffs for a part of the same work, by which he agreed to pay them seven cents per yard for excavating and eight cents for embankment, monthly, according to the measurement of the engineers, except ten per cent. which was not to be paid until the final estimate. The work on the canal, including that on which the plaintiffs were engaged, was stopped by the canal commissioners on the 21st day of June, 1841, before they had completed their job, and they never finished it. On the 29th of March, 1842, the legislature passed the act "to preserve the credit of the state," which put an end to the original contract between the defendant and the state, and before the commencement of this suit that contract had expired by its own limitation. The defendant paid the plaintiffs for all the work performed by them except the ten per cent. reserved, which amounted to $85.30, which sum the plaintiffs claimed to recover.

The defendant moved for a nonsuit on the ground, among others, that without a waiver of full performance of the contracts, or without some act of his to prevent the performance, the plaintiffs could not recover. The motion was overruled. The defendant then proved that the work actually done by the plaintiffs under the contract was worth only five cents for embankment and seven cents for excavation. He offered also to prove what the cost of the work not done would be, and that the excavation and embankment not done would be more difficult and expensive than the portion completed. This evidence was objected to and excluded. The referees before whom the trial was had reported in the plaintiffs' favor for the sum claimed. The common pleas confirmed their report, and rendered judgment thereon, which was affirmed by the supreme court, on error brought. The defendant appealed to this court.

GARDINER, J. The plaintiffs were stopped in the prosecution of the work, in fulfillment of their contract, by the authority of the State officers. Before this injunction was removed, the law of March 29, 1842, for preserving the credit of the State was passed which put an end to the original contract, and the agreement between the plaintiffs and defendant which grew out of it. Taylor v. Lowell, 3 Mass. 331, 3 Am. Dec. 141; Doughty v. Neal, 1 Saund. 216, note b (5th Ed.); Mounsey v. Drake, 10 Johns. 28.

As the plaintiffs were prevented by the authority of the State from completing their contract, they are entitled to recover for the work

performed at the contract price. The ten per cent. was a part of the price stipulated. It was reserved to secure the fulfillment of the contract, and to be paid upon a final estimate. The performance of the required condition became impossible by the act of the law, and, of course, the plaintiffs were entitled to recover without showing a compliance with the agreement in this particular. Comyn on Contracts, 50; Linningdale v. Livingston, 10 Johns. 36.

Upon the question of damages, I think the offered evidence was properly rejected. If the contract had been performed by the plaintiff, he might have recovered upon the special agreement, or upon the common counts, and in either case he would be entitled to the price fixed by the agreement. Phillips' Evidence, 109 (2d Ed.); Dubois v. Delaware & Hudson Canal Company, 4 Wend. 285, and cases cited. If the performance had been arrested by the act or omission of the defendants, the plaintiff would have had his election to treat the contract as rescinded, and recover on a quantum meruit the value of his labor, or he might sue upon the agreement, and recover for the work completed according to the contract, and for the loss in profits or otherwise which he had sustained by the interruption. Linningdale v. Livingston, 10 Johns. 36; 9 Barn. & Cress. 145; Masterton v. The Mayor, &c., of Brooklyn, 7 Hill, 69, 75, 42 Am. Dec. 38. In this case the performance was forbidden by the State. Neither party was in default. All the work for which a recovery is sought was done under the contract, which fixed a precise sum to be paid for each yard of earth removed, without regard to the difficulty or expense of the excavation. If the plaintiffs had commenced with the more expensive part of the work, they could not, under the circumstances, have claimed to have been allowed for the profits to arise from that portion which they were prevented from completing. Such an allowance is predicated upon a breach of the contract by the defendant. Id., 7 Hill, 71, 73, 42 Am. Dec. 38. The defendants, in the language of Beardsley, J., "are not, by their wrongful act, to deprive the plaintiff of the advantage secured by the contract." Here there was no breach of the agreement by either party. The plaintiffs could not recover profits, and the defendant cannot, consequently, recoup them in this action. Blanchard v. Ely, 21 Wend. 346, 34 Am. Dec. 250.

Again, the plaintiffs assumed the risk of all accidents which might enhance the expense of the work, while the contract was subsisting (Boyle v. Agawam Canal Co., 22 Pick. 384, 33 Am. Dec. 749; Sherman v. Mayor of New York, 1 N. Y. 321), and is entitled, consequently, to the advantages, if any, resulting from them. The suspension of the work by State authority was an accident unexpected by either party. It was one, which, under the offer, we are bound to assume, was of benefit to the plaintiffs. But the defendant cannot require an abatement from the agreed price, for what has been done, unless he could demand it in case a flood had partially excavated or embanked

the section of the canal to be completed by the plaintiffs. The judgment must be affirmed.

JEWETT, HURLBUT and PRATT, JJ., concurred.

BRONSON, Ch. J., RUGGLES, HARRIS and TAYLOR, JJ., were for reversal on the ground that the evidence offered upon the question of damages was improperly excluded.

Judgment affirmed.[19]

MENTONE v. ATHAWES.

(Court of King's Bench, 1764. 3 Burr. 1592.)

This was an action by a ship-wright for work and labor done and materials provided, in repairing the defendant's ship. And the question was, "whether the plaintiff was entitled to recover, under the following circumstances":

The ship, being damaged, was obliged to put back, in order to be repaired in dock; and was to have gone out of the dock on a Sunday: in the interim, viz. on the day before, only three hours work was wanting to complete the repair, a fire happened at an adjacent brewhouse, and was communicated to the dock; and the ship was burnt.

N. B. It was the ship-wright's own dock; and the owner of the ship had agreed to pay him £5 for the use of it.

This case was argued on Tuesday the 13th of this month by Mr. Murphy, for the plaintiff; and Mr. Dunning for the defendant.

For the plaintiff it was insisted that he was not answerable for this event, which happened without his neglect or default; unless there had been some special undertaking.

The plaintiff therefore was not answerable for this loss of the ship. And if the plaintiff be not liable for the loss of the ship, he is intitled to be paid for his work and materials. The materials must be considered as having been delivered. The merchant always pays £5 for the hire of a dock; and so he agreed to do in this case. And these materials were delivered on board his ship in this dock.

The defendant might have sold this ship, while it was in the dock; and these materials would have been part of it; the fixing them to the ship was a delivery of them. The adjunct must go with the subject. Dr. Cowell, in treating of the various modes of acquiring property, is of this opinion.[20]

[19] In Townes v. Cheney (1911) 114 Md. 362, 79 Atl. 590, the plaintiff, who had a contract for the services of a jockey in riding his race horses during certain years, transferred the contract and the right to the services of the jockey to the defendant under an agreement which provided as conditions of its efficacy that the jockey's father should consent to the transfer and that it should also be approved by a jockey club. The father of the jockey refused his assent and the transfer was not approved by the jockey club. It was held that the plaintiff was not entitled to recover on a quantum meruit for two months' services rendered by the jockey to the defendant before the father refused his assent and the jockey club declined to approve.

[20] The plaintiff's argument is abridged.

Mr. Dunning, contra, for the defendant.

The question is, "whether the plaintiff is intitled to be paid by the defendant for that work and labour from which the defendant neither did nor could reap any advantage."

The plaintiff was obliged to deliver the ship safe; having undertaken to repair it. The defendant has had no benefit from the plaintiff's labour or materials; neither was the plaintiff's undertaking completely performed. Carriers and hoymen cannot be intitled to be paid for carrying things that perish before they are delivered; nor jewellers, for setting a jewel, that is destroyed before it is set. So a taylor; where the cloth is destroyed before the suit is finished. So of any unfinished incomplete undertaking. As there is no express agreement to support this action, the Court will not imply any.

Mr. Murphy in reply. As to the defendant's not having had the benefit of the repair—There is no reason why the ship-wright should not be paid for his work and labour and materials. Digest, title De Negotiis Gestis. The defendant might have insured his ship. Nothing can be due to a carrier or hoyman, till the delivery of the goods at the destined place. But these materials were delivered; and the work and labour actually done. Suppose a horse sent to a farrier's to be cured, is burnt in the stable before the cure is completely effected; shall not the farrier be paid for what he has already done? A pawn-broker, if the pawn is destroyed by the act of God, shall recover the money lent.

Lord Mansfield. This is a desperate case for the defendant (though compassionate:) I doubt it is very difficult for him to maintain his point. Besides, it is stated, "that he paid £5 for the use of the dock."

Mr. Justice Wilmot. So that it is like a horse that a farrier was curing, being burnt in the owner's own stable.

Mr. Attorney General being retained to argue it for the defendant, the Court offered to hear a second argument from him, if he thought he could maintain his case; but seemed to think it would be a very difficult matter to do it. Mr. Attorney General appeared to entertain very little hope of success; however, he desired a day or two to consider of it. But

Mr. Recorder now moving "that the postea might be delivered to the plaintiff," the Attorney General did not oppose it. And a rule was made accordingly, that the postea be delivered to the plaintiff.

KEELING v. SCHASTEY & VOLLMER.

(District Court of Appeal, First District, California, 1912. 18 Cal. App. 764, 124 Pac. 445.)

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by J. G. Keeling against Schastey & Vollmer, a corporation. From a judgment for plaintiff and an order denying motion for new trial, defendant appeals.

KERRIGAN, J. This is an appeal by the defendant from a final judgment in favor of the plaintiff, taken within 60 days after entry, and from an order denying defendant's motion for a new trial, in an action in quantum meruit for labor performed and materials furnished.

Briefly, the facts are that in the month of June, 1907, the defendant entered into a contract with the Cliff House Company, a corporation, to alter and repair an existing building known as the Cliff House. Subsequently the defendant made a contract with A. C. Wocker, plaintiff's assignor, whereby certain painting and plastering work in and upon said building was to be done by the latter for a sum not exceeding $4,700, and he was to accept payments on the basis of 75 per cent. of the work done from time to time as the work progressed, the remaining 25 per cent. being payable 35 days after its completion.

Prior to the time Wocker was able to complete his contract, and after he had furnished labor and materials of the reasonable value of $3,545.96, the building was destroyed by fire without the fault of either party to the contract. At this time Wocker had received on account a payment of $1,800. This suit is to recover $1,745, alleged to be the difference between the amount paid and the reasonable value of the work as it had progressed up to the time of the destruction of the building.

It is well settled that, where one undertakes to furnish labor and materials in the building of a house or other structure for another for a specified sum, the builder cannot recover for a partial construction in case the building be destroyed without the fault of either party, unless the builder is protected against such contingency by the terms of the contract. In order to entitle the builder to recover, full performance of the contract is necessary, unless he has been prevented by the act of the other party, or by operation of law, or by the act of God, or by the public enemy (Carlson v. Sheehan, 157 Cal. 692, 109 Pac. 29; Green v. Wells, 2 Cal. 584); and fire is not classified as an act of God (Pope v. Farmers' Union & Milling Co., 130 Cal. 139, 62 Pac. 384, 53 L. R. A. 673, 80 Am. St. Rep. 87).

It is also very well established in this country that where one, as in this case, agrees to furnish labor and materials on an existing building, the property of another, the agreement is upon the implied condition that the building shall remain in existence, and that the destruction of it

without the fault of either party will excuse performance of the contract by the person performing such labor, and entitle him to recover the reasonable value of the part performance already effected. This view, it appears, is contrary to the English doctrine (Appleby v. Dodds, 8 East. 300; Appleby v. Myers, L. R. 2 Com. Pleas, 651); but it is the uniform rule in this country (30 Am. & Eng. Ency. of Law [2d Ed.] p. 1251, and numerous cases cited), except in the state of Illinois (Huyett & Smith Mfg. Co. v. Chicago Edison Co., 167 Ill. 233, 47 N. E. 384, 59 Am. St. Rep. 272).

In Hollis v. Chapman, 36 Tex. 1, a carpenter contracted to furnish the materials and to do the work on the defendant's brick building, then in course of construction, for a fixed sum of money, but before the work was completed the building was destroyed by fire without the fault of either party to the contract. The action was to recover for the materials furnished and labor done, and it was held that the carpenter was entitled to recover.

So in Cleary v. Sohier, 120 Mass. 210, where the plaintiff made a contract to lath and plaster a certain building for an agreed price per square yard. When the contract was about one-half performed, the building was destroyed by fire. The plaintiff sued in assumpsit for work done and materials furnished, and it was held that he was entitled to recover.

In Niblo v. Binsse, 3 Abb. Dec. 375, 40 N. Y. 476, the plaintiff's assignor contracted to do certain plumbing work in a house owned by defendant's testator. Part of the work was to be paid as it progressed, and the final payment upon its completion. During the performance of the contract the building was burnt without fault of the parties, and the plaintiff was permitted to recover for the work performed. This case, like the others, proceeded on the theory that there was a breach of the implied undertaking by the owner of the continued existence of the building, which was necessary to enable the contractor to perform his agreement.[21]

In the case of Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654, the court says: "When work is to be done under a contract on a chattel or building which is not wholly

[21] "We think Niblo v. Binsse, upon which the learned referee relied, was correctly decided, but, with due respect, we submit that the decision was placed upon untenable ground. The court said that it placed its decision upon the ground that the contractor was prevented from performing his contract by the default of the owner in failing to keep on hand and in readiness the building in which the work was to be done, and was in default whether the building was destroyed with or without fault on his part. The case shows that the building was destroyed without fault of either owner or contractor. If the defendant was without fault in the destruction of his building, it is difficult to see how he was in default for not keeping it on hand. In the Niblo Case, as in the one under review, we think the destruction of the building prevented and excused the defendant from keeping it on hand, and that neither party could recover damages of the other upon account of the breach of the contract thereby caused." Per Landon, J., in Hayes v. Gross (1896) 9 App. Div. 12, 40 N. Y. Supp. 1098.

the property of the contractor and for which he is not solely accountable, as where repairs are to be made on the property of another, the agreement on both sides is upon the implied condition that the chattel or building shall continue in existence, and the destruction of it without the fault of either of the parties will excuse performance of the contract, and leave no right of recovery of damages in favor of either against the other [citing cases]. In such cases, from the very nature of the agreement as applied to the subject-matter, it is manifest, that, while nothing is expressly said about it, the parties contemplated the continued existence of that to which the contract relates. The implied condition is a part of the contract as if it were written into it, and by its terms the contract is not to be performed if the subject-matter of it is destroyed, without the fault of either of the parties, before the time for complete performance has arrived." But says the same authority: "Where there is a bilateral contract for an entire consideration moving from each party, and the contract cannot be performed, it may be held that the consideration on each side is the performance of the contract by the other, and that a failure to completely perform it is a failure of the entire consideration, leaving each party, if there has been no breach or fault on either side, to his implied assumpsit for what he has done."

It is also contended by defendant that, if the plaintiff is entitled to recover at all, he is entitled to recover only 75 per cent. of the contract price of the work done and materials furnished up to the time of the fire. If this had been an action upon the contract, defendant's position would be sound; but this is an action for the reasonable value of the work and materials furnished, and therefore, as seen by the authorities just adverted to, the terms of the contract in this regard do not control.

The evidence is sufficient to support the findings, which cover all the material issues and support the judgment.

The judgment and order appealed from are affirmed.[22]

[22] "The plaintiff agreed to put a tin roof on defendant's house at five dollars per square. As the work progressed, it became the defendant's property. Every square of tin, as it was laid and soldered, became a fixed part of the building, by the skill and industry of the workman, ceased to be the property of the plaintiff, and became exclusively the defendant's. When the house burned, the roof, which as a part of it, in so far as completed, burned with it. It belonged to him, and the owner must bear the loss. The plaintiff was not an insurer, and received nothing for the risks; but the evidence shows that the defendant had the building, including the roof, insured for its benefit. Why, then, should it make the mechanic lose his labor and material, for which it receives pay from the insurance company?" Hysell v. Sterling Coal & Manufacturing Co. (1899) 46 W. Va. 158, 33 S. E. 95.

See, to the same effect, Hayes v. Gross (1896) 9 App. Div. 12, 40 N. Y. Supp. 1098 (an excellent opinion by Landon, J.).

In Young v. City of Chicopee (1904) 186 Mass. 518, 72 N. E. 63, plaintiff contracted to make certain repairs on a bridge for defendant, and in order to insure prompt completion of the repairs, the contract stipulated that no work should be begun until the lumber for at least one-half of the repairs contemplated should be "upon the job." Plaintiff complied with this stipula-

TAULBEE v. McCARTY.

(Court of Appeals of Kentucky, 1911. 144 Ky. 199, 137 S. W. 1045, 36 L. R. A. [N. S.] 43, Ann. Cas. 1913A, 456.)

Action by F. M. McCarty against S. S. Taulbee. Judgment for plaintiff, and defendant appeals.

HOBSON, C. J.[23] S. S. Taulbee owned a house in Jackson, Ky., and made a contract with F. M. McCarty by which McCarty agreed to raise the house and put a new foundation under it for $400. McCarty dug some trenches around the house preparatory to raising it, and got out the stone for the foundation, which was to be put under the house after it was raised. After he had done this, and before he had begun raising the house, it accidentally caught fire and burned down. He then brought this suit against Taulbee to recover for the work he had done. The house was destroyed without the fault of either party, but McCarty claimed that Taulbee was to furnish certain jacks to be used in raising the house; that Taulbee delayed him in his work by his negligence in furnishing the jacks; and that but for this he would have completed the contract before the time the house caught fire. * * * The undisputed evidence is that [Taulbee] ordered [the jacks] at once, and this was all that he could do under the circumstances. On these facts the circuit court gave judgment in favor of McCarty against Taulbee for $258, the value of the work which he had done in digging the ditches and getting out the rock for the job. Taulbee appeals.

tion and placed his materials on the river bank adjacent to the bridge. After part of the repairs had been completed an accidental fire destroyed the bridge and also plaintiff's lumber not yet incorporated in the bridge. Defendant conceded plaintiff's right to the value of the work done and materials wrought into the structure, but disputed plaintiff's claim for the value of the materials stored on the bank and destroyed by the fire. The court decided the latter point for the defendant, Hammond, J., saying: "It is to be noted that there had been no delivery of this lumber to the defendant. It was brought 'upon the job' and kept there as the lumber of the plaintiff. The title to it was in him and not in the defendant. Nor did the defendant have any care or control over it. No part of it belonged to the defendant until wrought into the bridge. The plaintiff could have exchanged it for other lumber. If at any time during the progress of the work before the fire the plaintiff had refused to proceed, the defendant against his consent could not lawfully have used it. Indeed, had it not been destroyed, it would have remained the property of the plaintiff after the fire. Nor is the situation changed, so far as respects the question before us, by the fact that the lumber was brought there in compliance with the condition relating to the commencement of the work. This condition manifestly was inserted to insure the rapid progress of the work, and it has no material bearing upon the rights of the parties in relation to the lumber. * * * In the present case the defendant, in accordance with this doctrine, should be held liable for the labor and materials actually wrought into the bridge. To that extent it insured the plaintiff. But it did not insure the plaintiff against the loss of lumber owned by him at the time of the fire, which has not then come into such relations with the bridge as, but for the fire, to enure to the benefit of the defendant as contemplated by the contract."

[23] A portion of the opinion is omitted.

We have read the record with much care and find that there is nothing in it to charge Taulbee with negligence in getting the jacks. While there was some delay in getting the jacks, this was from causes which Taulbee could not control. The burning of the house was an accident which neither of them anticipated, and there is no reason under the evidence for charging Taulbee, who had lost his house, with the loss that McCarty sustained on the ground that it was his fault that the jacks were not on hand. It remains to determine whether, on a contract to raise a house, the owner of the house is liable for what the contractor has done under the contract, when the house burns down before the work is in fact done on the house. There are a number of American cases holding that where a contractor agrees to perform work on property belonging to another, and without the fault of either the property is destroyed by fire or otherwise, before the work is completed, the contractor may recover on a quantum meruit for the services performed. Cleary v. Sohier, 120 Mass. 210; Whelan v. Ansonia Clock Co., 97 N. Y. 293; Hollis v. Chapman, 36 Tex. 1; Cook v. McCabe, 53 Wis. 250, 10 N. W. 507, 40 Am. Rep. 765. On the other hand, the contrary was held in England in Appleby v. Meyers, 16 L. T. N. S. 669. This view has been followed by the following American cases: Brumby v. Smith, 3 Ala. 123; Newman Lumber Co. v. Purdum, 41 Ohio St. 373; Fildew v. Besley, 42 Mich. 100, 3 N. W. 278, 36 Am. Rep. 433; Krause v. Carrothersville School Trustees, 162 Ind. 278, 70 N. E. 264, 65 L. R. A. 111, 102 Am. St. Rep. 203, 1 Ann. Cas. 460; Dame v. Woods, 73 N. H. 222, 60 Atl. 744, 70 L. R. A. 133; Siegel v. Eaton, 165 Ill. 550, 46 N. E. 449.

The view taken by these cases is preferred by Judge Story. (Story on Bailments, § 426b), by Mr. Bishop (Bishop on Contracts, § 588), and by the editor of the second edition of the American & English Encyclopædia of Law (volume 15, p. 1090). It seems to us the sound rule on principle. Where a contract is an entirety, he who has not performed his contract cannot maintain an action upon it. Implied contracts are as a rule only maintained to prevent the enrichment of one person at the expense of another. As a rule there is no implied contract where no benefit has been received. The plaintiff here cannot recover upon his contract because he has not performed it; he cannot recover against Taulbee upon an implied contract, for Taulbee has received no benefit from his work. The rock which McCarty got out is his, and he can do as he pleases with it. The ditches which he dug were dug simply to facilitate his work in putting in the new foundation and are of no benefit to Taulbee now that the house is burned.[24] If McCarty had undertaken to add a room to the house for $400, and, before he had finished the addition, the addition only had

[24] But see Angus v. Scully (1900) 176 Mass. 357, 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. Rep. 318.

burned, leaving the old house intact, under all the authorities, McCarty could have maintained no action against Taulbee for the work he had done. We cannot see that a distinction can be made between a case where the whole house burns and where only that part burns which the workman is adding to the house. The fact that the remainder of the house also burned does not put the workman in a better position than if his work alone had burned.

In this case McCarty had done no work on the house itself, and we do not see that he can be in a better position than he would be if he had undertaken to add a room to the house and the whole structure had burned before he had completed his contract or was entitled to demand anything of Taulbee under it. Of course, a different rule applies where by the contract payments are to be made as the work progresses, and some of the cases above referred to turn on this distinction. It is sometimes said that there can be no recovery in such cases where the contract provides that nothing is to be paid by the owner until the work is completed. But no sound distinction can be maintained between such a contract and one like that before us, where the owner is to pay a lump sum for certain work when completed. In such a case no money may be demanded of him until the contract is performed. The legal effect of the contract is that nothing is to be paid until the work is done. What is implied by law need not be expressed.

In 2 Parsons on Contracts, side page 658, the rule is thus stated: "A partial performance may be a defense, pro tanto, or it may sustain an action, pro tanto; but this can be only in cases where the duty to be done consists of parts which are distinct and severable in their own nature, and are not bound together by expressions giving entirety to the contract. It is not enough that the duty to be done is in itself severable, if the contract contemplates it only as a whole."

Under the facts shown, the contract, being an entirety, and not performed, no recovery may be had for what was done under it. Judgment reversed, and cause remanded for a judgment dismissing the petition.[25]

[25] In Appleby v. Myers (1867) L. R. 2 C. P. 651 (cited in the principal case), the plaintiffs had contracted to install certain machinery in defendant's factory and to keep the same in repair for two years. After part of such machines had been installed an accidental fire destroyed the entire building. Plaintiffs sued for the value of the machinery already installed, but the Court of Exchequer Chamber, reversing a unanimous decision of the Court of Common Pleas, held for defendant. Blackburn, J., who delivered the opinion of the court, after pointing out that "the whole question depends upon the true construction of the contract between the parties," and after expressing a doubt as to whether, owing to the peculiar provisions of the agreement, the title to the machinery had ever passed to the defendant, said: "There is nothing to render it either illegal or absurd in the workman to agree to complete the whole and be paid when the whole is complete and not till then: and we think that the plaintiffs in the present case had entered into such a contract" —citing Cutter v. Powell, 6 T. R. 320, page 249, supra, and kindred cases.

SECTION 2.—CONTRACT ILLEGAL

CLAY v. YATES.

(Court of Exchequer, 1856. 1 Hurl. & N. 73.)

Declaration for goods sold and delivered, and work and labour and materials.—Plea: never indebted.

At the trial, before Pollock, C. B., at the London Sittings after last Hilary Term, it appeared that the defendant applied to the plaintiff, a printer, to print a second edition of a treatise called "Military Tactics." This edition was to contain a dedication to Sir William Napier. The plaintiff verbally agreed to find the paper and print 500 copies for £4. 10s. a sheet. At the time the plaintiff commenced printing the treatise the dedication was not written, but it was afterwards sent to him, and the type set up without his having any knowledge of its contents. After the proof sheets of the dedication had been revised by the defendant and returned to the plaintiff, he for the first time discovered that the dedication contained libellous matter, and he refused to complete the printing of it. The defendant would not pay for the treatise without the dedication, whereupon the present action was brought to recover for printing the treatise.

It was objected, on behalf of the defendant: first, that this was a contract for the sale of goods within the 17th section of the Statute of Frauds, 29 Car. II, c. 3, as extended by the 9 Geo. IV, c. 14, § 7; secondly, that the contract was an entire one, viz., to print the treatise and the dedication, and that the plaintiff having refused to print the dedication was not entitled to recover in respect of the treatise. The learned judge left it to the jury to say, first, whether work and labour was the essence of the contract, and the materials merely ancillary; secondly, whether the dedication was libellous. The jury found both questions in the affirmative, whereupon a verdict was entered for the plaintiff, leave being reserved to the defendant to enter a verdict for him.

A rule nisi was allowed.

Pollock, C. B.[26] The rule must be discharged. The first question is, whether this is a contract for the sale of goods within the 17th section of the Statute of Frauds, and I am of opinion that it is properly a contract for work, labour, and materials. * * *

Then with respect to the other point, I entertain no doubt. I told

[26] Portions of the opinions of Pollock, C. B., and Martin, B., discussing the applicability of the statute of frauds, and the concurring opinion of Bramwell, B., are omitted. Alderson, B., concurred.

the jury that if the plaintiff agreed to print the dedication and the treatise, and so undertook to print that which he knew to be libellous, and afterwards said that he would not print both; in such case he could not recover. I think his right to recover rests entirely on this ground, that he had been furnished with the treatise without the dedication. The dedication was afterwards sent, but he had no opportunity of reading it until after it was printed; he then discovered that it was libellous, and refused to permit the defendant to have it. I think that if a contract is bona fide entered into by a printer to print a work consisting of two parts, and at the time he enters into the contract he has no means of knowing that one part is unlawful, and he executes both, but afterwards suppresses that which is unlawful, there is an implied undertaking on the part of the person employing him to pay for so much of the work as is lawful. For these reasons I think that the rule ought to be discharged.

MARTIN, B. I am of the same opinion. * * * I think that the plaintiff was employed to do work and labour, and supply materials, and for that he is entitled to be paid. * * *

With respect to the other point, I agree that as soon as a printer discovers the objectionable nature of the work which he is employed to print, he ought to stop, and that he would not be entitled to recover for work done after he made the discovery. But I cannot doubt that in this case, although the contract has never been performed, yet as the work was commenced on the retainer of the defendant, and in ignorance that part of it was unlawful, a duty arises to pay the plaintiff for that part which he has performed. It is like one of those transactions where a person accepts goods not made according to contract, in which case the law implies a promise to pay for them; though perhaps the better expression would be, "a duty arises to pay for them," for the true ground of the right to recover is, that such a state of circumstances has arisen that in point of law there is a duty to pay. * * *

Rule discharged.[27]

[27] In Oom v. Bruce, King's Bench (1810) 12 East, 225, insurance was made on goods shipped from a port in Russia to London, by an agent residing in London for a Russian subject residing abroad. The insurance was, in fact, made after the commencement of hostilities by Russia against England, but before the knowledge of it reached England, and after the ship had sailed and had been seized and confiscated. Held, that although the policy was void, the agent was entitled to the return of the premiums paid; Lord Ellenborough, C. J., saying: "Here the plaintiffs had no knowledge of the commencement of hostilities by Russia, when they effected this insurance; and, therefore, no fault is imputable to them for entering into the contract; and there is no reason why they should not recover back the premiums which they have paid for an insurance from which, without any fault imputable to themselves, they could never have derived any benefit."

See, also, Bloxsome v. Williams (1824) 3 B. & C. 232, where Bayley, J., said, as to a contract for the purchase of a horse alleged to have been entered into on Sunday between plaintiff and defendant a horse trader, whom plaintiff did not know to be a horse trader: "If the contract be void as falling within

VISCHER v. YATES.

(Supreme Court of New York, 1814. 11 Johns. 23.)

This was an action of assumpsit for money had and received to the use of the plaintiff. Plea, non assumpsit. The cause was tried at the Albany circuit, in October, 1813, before Mr. Justice Thompson.

The plaintiff, in April, 1813, deposited with Joseph Alexander, as his agent, 500 dollars, to bet on the approaching election of the governor of this state. Before the election took place, to wit, on the 17th of April, Alexander and Philip S. Parker made a bet of 2,500 dollars, and deposited the money with the defendant, who delivered to each of them a certificate in writing, as follows: "This may certify that Philip S. Parker has deposited with me $2,500, and Joseph Alexander has deposited with me the like sum; and in case Stephen Van Rensselaer is elected Governor of the state of New York, at the ensuing election, then I am to pay the above two sums to Joseph Alexander; and in case Daniel D. Tompkins is elected governor as aforesaid, then I am to pay the said sums to Philip S. Parker: such payments to be made immediately after the votes are canvassed. April 17, 1813. John W. Yates." The $500 left with Alexander, by the plaintiff, was part of the sum so deposited; the residue belonged to four other persons; and Alexander informed the defendant and Parker, at the time, that the money so deposited by him was not his own, but that he made the bet as agent for others, whose names, however, he did not then mention. On the 31st of May, 1813, Alexander gave a written notice to the defendant, mentioning the names of the persons to whom the money deposited by him belonged, and specifying the particular sums belonging to each respectively. After this notice, the plaintiff demanded the $500 belonging to him, from the defendant, who admitted he had the money in his possession, but refused to deliver it to the plaintiff. In the meantime, May, 1813, the election had been held and Daniel D. Tompkins was elected governor, which fact was certified by the official canvassers of the vote on June 1st, 1813.

The jury found a verdict for the plaintiff for $500, with interest,

the statute, then the plaintiff, who is not a particeps criminis, may recover back his money, because it was paid on a consideration which has failed."

But see Harse v. Pearl Life Assurance Co., [1904] 1 K. B. 558, where the Court of Appeal held that premiums paid by plaintiff upon a policy of insurance upon the life of his mother (an invalid insurance for lack of insurable interest in plaintiff) could not be recovered back although plaintiff had in good faith acted in reliance on the representation of defendant's agent that such a policy was valid; Collins, M. R., saying: "The statement made by the agent was not a statement of fact, but one of the law, and was made innocently, as the jury have found. Unless there can be introduced the element of fraud, duress, or oppression, or difference in the position of the parties which created a fiduciary relationship to the plaintiff so as to make it inequitable for the defendants to insist on the bargain that they had made with the plaintiff, he is in the position of a person who has made an illegal contract and has sustained a loss in consequence of a misstatement of law, and must submit to that loss."

subject to the opinion of the court, on a case containing the facts above stated; and it was agreed that either party might turn the case into a special verdict, for the purpose of bringing a writ of error.

KENT, C. J.[28] * * * The wager in this case was illegal. This was so decided in Bunn v. Riker, 4 Johns. 426, 4 Am. Dec. 292, and that decision was afterwards repeated in Lansing v. Lansing, 8 Johns. 454. And when we consider the importance of popular elections to the constitution and liberties of this country, and that the value of the right depends upon the independence, moderation, discretion, and purity with which it is exercised we cannot but be disposed to cherish a decision which declares gambling upon such elections to be illegal, as being founded in the clearest and most incontestable principles of public policy.[29] Here was, then, an illegal contract, and the plaintiff, by his agent, deposited 500 dollars with the defendant, as a stakeholder, to be hazarded at the governor's election. If, after the determination of the event against the plaintiff, the money had actually been paid over to the winner with the plaintiff's consent, or perhaps without notice to the defendant to the contrary, the plaintiff could not have sustained an action against the winner to recover back the deposit. This was so decided in Howson v. Hancock, 8 Term Rep. 575, and Lord Kenyon said, in that case, that there was no instance of such an action being maintained. The case, then, of Lacaussade v. White, in 7 Term Rep. 525, (and which appears to be very imperfectly reported,) was either an action against the stakeholder, before the money was paid over, as Lord Kenyon understood it, or it was corrected and overruled by the case of Howson v. Hancock.

There is also a decision in this court, in exact conformity with the latter case. McCullum v. Gourlay, 8 Johns. 147. But the present action is not against the winner, after the money has been paid, but

[28] Portions of the opinion are omitted.

[29] WAGERING CONTRACTS.—"The rule at the common law was that all wagering contracts that were contrary to good morals or public policy were illegal and void. The courts of England at an early day held that betting on a horse race was not opposed to good morals. The courts of that country reluctantly followed this early precedent, until the common law interpretation of wagering contracts was changed by the statutes of 8 and 9 Victoria, which made all contracts of wager void. Is betting on the result of a race contrary to good morals? We are not bound by the decisions of the courts of England, in determining that question. Whether a thing in the eyes of the law is moral or immoral may depend largely upon when and where it occurred. An act may be upheld as moral in one country and be regarded as immoral in another. A wager contract might have been sustained a hundred years ago as being in conformity with good morals, and be condemned today as immoral. In this country, betting on a race is now generally regarded as against sound morals. As a general rule, the courts of this country, in the more recent decisions, have refused to enforce all wagering contracts, even though they are not declared illegal by statute. Such contracts are certainly against good morals, a detriment to society, and, under the principles of the common law are illegal and void." Deaver v. Bennett (1890) 29 Neb. 812, 816, 46 N. W. 161, 26 Am. St. Rep. 415.

it is against the stakeholder before the money has been paid, and after notice to the stakeholder not to pay it over, and it falls within the case of Cotton v. Thurland, 5 Term Rep. 405. That was the case of a wager deposited with a stakeholder, upon the event of a battle to be fought between the plaintiff and a third person. The battle was fought, and notice was then given to the defendant not to pay over the money; and it was held by the court of K. B. that the action lay against the stakeholder to recover back the deposit, as the money was still in his hands, and he was answerable to some person for the money, and had no conscience on his part to retain it. This case has never been contradicted or questioned; and it is precisely in point. There is not a decision to be met with in the English law that is against it.

The cases are generally between the principals to the illegal contract; and the courts take a distinction between contracts that are immoral or criminal, and such as are simply illegal and void. Assistance is usually given to the party, in the latter cases, to recover back his money; and this court lent such assistance in the case of Mount & Wardell v. Waite, 7 Johns. 434. The stakeholder ought not to be permitted to hold the money in defiance of both parties. There would be no equity in such a defence, and if the plaintiff cannot recover back the deposit in this case, the winner cannot recover it; for that would be compelling the execution of an illegal contract as if it were legal, and would at once prostrate the law that declares such contracts illegal. The case of Edgar v. Fowler, 3 East, 222, is to this effect. In that case the premium for an illegal insurance, was considered by the assured, and by the broker, as paid to the broker for the insurer, and the policies were signed. The assured afterwards gave notice to the broker "to hold the stakes deposited by him, in his hands, for his use, and not to pay any money over;" and the insurer was not permitted to recover the premium, so admitted to be deposited, because it would be enforcing an illegal contract.

Much is said, in some of the cases, upon the distinction between executed and executory contracts, and that where the plaintiff waits, without taking any step to rescind the contract until the risk has been run, the courts will not help him to recover back the deposit money, but will remain neutral between the parties. The claim of the plaintiff is repelled by the maxim, that in pari delicto potior est conditio possidentis. But this objection is applied exclusively to the suit against the principal, or winner; and there is no instance in which it has been used as a protection to the intermediate stakeholder, who, though an agent in the transaction, is no party in interest to the illegal contract. As between the plaintiff and him the maxim has no application. He is not in pari delicto, and the parties must be equally criminal, before the maxim can be applied. The stakeholder cannot in good conscience appropriate the money to his own use; and it was received without a valid consideration, and for an illegal purpose, the plaintiff, as against him, has the preferable title.

The action is founded on the disaffirmance of the unlawful contract, and on the ground that it is void, and that the money ought not to pass to the winner. After the event, it is then, indeed, too late for the loser to reclaim the money from the winner, for then the maxim applies; but before the event has happened, either party may repent, and recall the deposit money, even out of the hands of his opponent. And if the money is still with the stakeholder, the happening of the event is immaterial, and either party may, at any time, arrest it. These are the true distinctions, and which go to reconcile all the cases. "In illegal transactions the money," as Lord Ellenborough said in Edgar v. Fowler [3 East, 222], "may always be stopped while it is in transitu to the person who is entitled to receive it." * * *

The English rule is the true rule on this subject. On the disaffirmance of the illegal and void contract, and before it has been carried into effect, and while the money remains in the hands of the stakeholder, each party ought to be allowed to withdraw his own deposit. The court will then be dealing equitably with the case. It will be answering the policy of the law, and putting a stop to the contract before it is perfected. By denying the plaintiff his right of recovery, we should condemn what is now the acknowledged English law, and we should infringe the spirit of many decisions, (and one of them in this court,) which have allowed premiums to be recovered back, when actually paid over, where there is no intrinsic criminality in the contract. We should also find that the practice of betting at elections would be continued, with all the heat and corruption which it engenders; for if the plaintiff cannot, by law, recall his deposit from the stakeholder, it will most certainly pass into the hands of the winner. The courts have gone quite far enough, when they refuse to help either party, as against the other, in respect to these illegal contracts. * * *

The court are, accordingly, of opinion that the plaintiff is entitled to judgment. Judgment for the plaintiff.[30]

[30] The principal case represents the prevailing common law doctrine. Hastelow v. Jackson (1828) 8 B. & C. 221; McLennan v. Whiddon (1904) 120 Ga. 666, 48 S. E. 201; Taylor v. Moore (1898) 20 Ind. App. 654, 50 N. E. 770; Fisher v. Hildreth (1875) 117 Mass. 558.

In Hastelow v. Jackson, supra, Littledale, J., said: "If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards. In the case of persons entering into such a contract and paying money to a stakeholder, if the event happens and the money is paid over without dispute, that is considered as a complete execution of the contract, and the money cannot be reclaimed; but if the event has not happened, the money may be recovered. With respect to a stakeholder, there is a third case, viz., where the event has happened, but before the money has been paid over, one party expresses his dissent from the payment. Under such circumstances he may recover it; and perhaps it may then be said, that although the event has happened, yet the contract is not completely executed until the money has been paid over, and therefore the party may retract at any time before that has been done."

In Fisher v. Hildreth, supra, Colt, J., said: "A stakeholder is a mere depositary for both parties of the money advanced by them respectively with

WATTS v. LYNCH.

(Supreme Court of New Hampshire, 1886. 64 N. H. 96, 5 Atl. 458.)

Assumpsit, to recover $50 deposited by the plaintiff with a stakeholder, about November 1, 1884, upon a wager with the defendant as to the result of the coming presidential election. The defendant won the bet, and the stakeholder thereupon paid over the money to him. Facts agreed.

BLODGETT, J. Section 12 of chapter 272, Gen. Laws 1878, makes void all bets and wagers upon any question in which the parties have no interest in the subject except that created by the wager, and section 13 gives the loser a right of action against the winner for any money or property won or received by him upon such bet or wager. Consequently the otherwise fatal objection of particeps criminis does not avail against the plaintiff, and, as the agreed facts suggest no other defense, nothing appears which precludes him from a recovery.

Judgment for the plaintiff.[31]

a naked authority to deliver it over upon the proposed contingency. He is not regarded as a party to the illegal contract. Upon the revocation of the authority the money remains in his hands as a naked deposit to the use of the parties depositing it. He cannot avoid his responsibility to the loser by afterwards paying the whole of it to the winner."

The principal case (Vischer v. Yates) was, however, overruled by the New York Court of Errors and Appeals in Yates v. Foot (1814) 12 Johns. 1, holding that demand on the stakeholder comes too late when made after the wager has been decided, even though the stake has not yet been paid. Accord: Johnston v. Russell (1869) 37 Cal. 670; Connor v. Black (1896) 132 Mo. 150, 33 S. W. 783.

RECOVERY AGAINST WINNER.—The amount of the deposit can also be recovered from the winner, if he received it from the stakeholder with knowledge that the stakeholder has been notified not to pay it over. McKee v. Manice (1853) 11 Cush. (Mass.) 357.

NOTICE OF REPUDIATION AND DEMAND.—"Where the parties to a wager have agreed that the stakeholder shall determine who has won the wager, and pay the stakes to the winning party, the stakeholder may rely upon the agreement, and pay the stakes to the party in whose favor he decides, unless, before the payment is made, the losing party renounce the wager and demand his money; but a demand of the stakes, on the ground that he has won the wager, is not a repudiation of the wager, and will not render the stakeholder liable for payment to the other party." Okerson v. Crittenden (1883) 62 Iowa, 297, 17 N. W. 528; Patterson v. Clark (1879) 126 Mass. 531.

Contra: Hastelow v. Jackson (1828) 8 B. & C. 221, 108 Eng. Rep. 1026; Hale v. Sherwood (1873) 40 Conn. 332, 16 Am. Rep. 37. ("That plaintiff demanded a greater sum than he had deposited, we think is not a reason why he should not be entitled to the sum he actually did deposit." But see dissenting opinion of Park, J.)

If the race which is the subject-matter of the wager be declared off, the deposit cannot be recovered from the stakeholder without a previous demand. Jones v. Cavanaugh (1889) 149 Mass. 124, 21 N. E. 306.

[31] "If the statute had not given an action to recover money lost at play, it is quite certain that on the general principles of law a suit for such a purpose could not be maintained. The winner's exemption from suit and recovery would not result, however, from any title in himself to the money or thing won and received by him. On the contrary, the whole transaction being unlawful, he is bound in conscience to make restoration, and would be bound in law to do so, but for a peculiar maxim having the force of law, and accord-

EASTERN EXPANDED METAL CO. v. WEBB GRANITE & CONST. CO.

(Supreme Judicial Court of Massachusetts, 1907. 195 Mass. 356, 81 N. E. 251, 11 Ann. Cas. 631.)

Actions by the Eastern Expanded Metal Company against the Webb Granite & Construction Company and by the Webb Granite & Construction Company against the Eastern Expanded Metal Company. From the judgment, said Webb Granite & Construction Company brings exceptions.

KNOWLTON, C. J.[32] These are cross-actions growing out of the furnishing of labor and materials by the plaintiff in the first action, hereinafter called the plaintiff, for the defendant in that action, which is hereinafter called the defendant, in the erection of the Hotel Somerset on Commonwealth avenue in Boston. The first suit was brought upon an account annexed, and the second is for a breach of a contract in writing under which the work was done. This contract called for the construction by the plaintiff of the steel frame, the floors, the roof and some other parts of the building, "in conformity with the requirements of the statute regulating the construction, maintenance and inspection of buildings in the city of Boston, and to the satisfaction of

ing to which the courts withhold their remedial processes from each of the offending parties. 'In pari delicto potior est conditio defendentis' is the rule in such cases; but this is a rule which acknowledges no just or legal title in the defendant. It assumes, on the other hand, that the money or thing in his possession has been acquired in violation of the law, and it then denies a remedy to the other party because he has been an equal sharer in the same offence. Thus the parties are left where the law finds them, and the defendant prevails, not upon his own merits or title, but because the plaintiff is deemed unworthy to be heard in the particular case. Nellis v. Clark, 20 Wend. (N. Y.) 24, and cases cited; s. c. in Court of Errors, 4 Hill (N. Y.) 424. This maxim of the common law which would leave the loser at play without a remedy, is abrogated in reference to gaming transactions, by the 14th section of the statute above quoted. That statute declares that the 'person' who has lost the money may recover it back if he sues within a specified time. In a literal and exact sense, the statute gives the action; because without it the suit could not be maintained. Yet the clause does not so much create the right as it removes the difficulty which obstructed the remedy. The right in such a case rests upon the illegality and the voidness of the transaction; upon the absence of any just or legal title in the defendant to the money or thing in controversy. The unworthiness of the plaintiff to approach the altar of justice, was the only thing which stood in the way of the remedy. That difficulty being removed by the Legislature, I see no reason why the right to demand and recover money, staked and lost in gaming, is not as much a part of a man's estate as any other right in action which he can possess. And if this be so, why is not such a demand, like any other, capable of being transferred by act of the party or of the law?" (accordingly the court held that such right of action was assignable). Meech v. Stoner (1859) 19 N. Y. 26, per Comstock, J.

If the statute so provides, recovery may be had against the stakeholder, although he has paid the winner before notice of repudiation by the loser. Van Pelt v. Schauble (1902) 68 N. J. Law, 638, 54 Atl. 437.

[32] Portions of the opinion, citing authorities and discussing a collateral matter, are omitted.

the building commissioner of said city," all as shown in the drawings prepared by the architect, etc. Section 64 of St. 1892, p. 489, c. 419, regulating the construction of buildings in the city of Boston, forbids under a penalty the erection of a building, of the class to which the Hotel Somerset belongs, with a roof having a pitch of more than 20 degrees. The drawings of the architect made the roof of this building have a pitch of 30 degrees. The contract, by a general provision, required that the building should be erected in conformity with this statute, but in the particular provisions as to the roof it called for a building whose erection was forbidden by the statute. Out of this part of the contract relative to the roof the controversy between the parties has arisen.

The jury, in answer to a question, have found by their verdict that the plaintiff, when the contract was executed, did not know that the agreement called for a roof with a pitch of more than 20 degrees. The contract was executed on November 8, 1897, and on December 17, 1897, it was modified by a supplemental contract which does not affect the questions before us. On March 25, 1898, the plaintiff's attention having been called to the pitch of the roof, it wrote to the defendant in regard to it, and from that date until May 22, 1898, there were negotiations by letters and interviews between the parties in reference to this matter, to see if some arrangement could be made that would be satisfactory to both. On this last date, the defendant having finally insisted that the roof should be constructed with a pitch of 30 degrees according to the contract, and the plaintiff having declined to violate the law in this particular, the plaintiff discontinued work, and the defendant caused the construction to be completed by another party.

The presiding justice ruled that the contract was illegal, and that the defendant could not recover damages in the cross-action for the breach of it, nor avail itself of this breach as a defense to the plaintiff's claim in the original action. The exception of the defendant to this ruling presents the first question for our consideration.

While this statute was enacted in the interest of the public with a prescribed penalty for the violation of its provisions and while it gives jurisdiction in equity for its enforcement, we think that it plainly renders illegal the acts which it purports to prohibit, and that it forbids these acts, instead of prescribing regulations that are merely directory. * * * We are of opinion that the judge was right in ruling that the contract was not enforceable in favor of the defendant, either as a foundation for a cross-action or as a defense to the original action.

The next question is whether the jury could be permitted to find for the plaintiff on the account annexed, upon its disaffirmance of the contract under which the labor and materials were furnished.

It has been held in many cases that, where the matters called for in the contract that render it illegal do not involve moral turpitude, but are merely mala prohibita, and while the contract remains executory,

either party may disaffirm it on account of its illegality and recover back money or property that he has advanced under it. If the contract has been executed the court will not relieve either party from the consequences of his own violation of law. But so long as it is entirely unexecuted in that part which the law forbids, there is a locus pœnitentiæ. The doctrine is stated very fully in White v. Franklin Bank, 22 Pick. 181. * * *

Most of these cases relate to the recovery of money or property that has been advanced under the illegal contract which is subsequently repudiated. In the present case labor and materials for the improvement of real estate were furnished by the plaintiff. In this commonwealth, when labor and materials are furnished and used upon real estate under a special contract and for reasons which are not prejudicial to the plaintiff the contract becomes of no effect, it is held that the party furnishing them may recover upon a quantum meruit, for their value as a benefit to the real estate. A familiar illustration of this rule is found in the cases where a contractor, acting in good faith in an effort to perform his contract, fails to complete it entirely, as in Hayward v. Leonard, 7 Pick. 181, 19 Am. Dec. 268, and Blood v. Wilson, 141 Mass. 25, 6 N. E. 362. Another illustration is when it becomes impossible to perform the contract because the subject to which it relates is destroyed, by fire or otherwise, without the fault of either party. Butterfield v. Byron, 153 Mass. 517, 27 N. E. 667, 12 L. R. A. 571, 25 Am. St. Rep. 654; Angus v. Scully, 176 Mass. 357, 57 N. E. 674, 49 L. R. A. 562, 79 Am. St. Rep. 318; Young v. Chicopee, 186 Mass. 518, 72 N. E. 63.

We are of opinion that, when labor and materials have been furnished upon real estate under a contract which contains an illegal element under a prohibitory statute, and when the contract remains entirely executory in that part which is illegal, and is disaffirmed because of its illegality, the disaffirming party has the same right to have compensation for the benefit conferred upon the real estate that he would have to recover for money or property received by the other party before the disaffirmance of such a contract. This is an application of the principle which governs the decisions in the cases cited above.

In the present case, under the instructions of the court, the jury must have found that the contract was disaffirmed by the plaintiff because of its illegality, and that, in reference to the objectionable part, it remained wholly executory. We are of opinion that the construction of the lower portions of the building, which were entirely in conformity with the statute, did not deprive the plaintiff of its right to repudiate the contract before doing anything which was illegal, especially as it has been found that the plaintiff was ignorant of the illegality when it executed the contract, and as it was easy to change the plan for the roof and make it conform to the statute when the plaintiff left the work. In many of the cases cited above some action had been taken by the plaintiff under the contract before the disaf-

firmance of it, as in the cases of recovery of money wagered and put in the hands of a stakeholder. The important point in most of the decisions is that the part of the contract directly in violation of law had not been executed. The bringing of a suit for the recovery of money or property advanced necessarily implies that something has been done under the contract.

The fact that some work was done by an engineer of the plaintiff on the plans for the roof, which did not form a part of the construction of the building, and for which no claim was made in this suit, is immaterial. This was done in connection with negotiations for a new arrangement between the parties, which occupied a considerable time. These plans were not turned over to the defendant. * * *

In each case the entry is: Exceptions overruled.[83]

GRAY v. ROBERTS.

(Supreme Court of Kentucky, 1820. 2 A. K. Marsh. 208, 12 Am. Dec. 383.)

THE CHIEF JUSTICE delivered the opinion of the court.

This was an action of assumpsit for money had and received, and was tried on the plea of non assumpsit.

On the trial, it appeared that the plaintiff had executed four notes for twenty dollars each, as the price of a lottery ticket, in a lottery set on foot by David Williamson, and that he had paid to the defendant, as agent for Williamson, the amount of the notes, a part of which was paid voluntarily and without suit, and a part after judgment had been rendered against him therefor by a justice of the peace. It also appeared that Williamson, previous to setting on foot his lottery, had executed a deed conveying all the property of which the prizes in his scheme of a lottery were to consist, to trustees for the payment of his debts, and that the trustees had, since the drawing of the lottery, sold the property, and that it was not sufficient to pay the debts.

On the motion of the defendant, the circuit court instructed the jury that the plaintiff could not maintain the action for the money paid either before or after judgment, although it should appear that the money had not been paid over by the defendant. The jury found a

[83] In Kearley v. Thompson (1890) 24 Q. B. D. 742, the defendants were solicitors to the petitioning creditor in certain bankruptcy proceedings, and had incurred costs which were to be paid out of the estate. The plaintiff, a friend of the bankrupt, offered to pay to the defendants £40. for these costs (which had not been paid owing to want of assets), on their undertaking not to appear at the public examination of the bankrupt, and not to oppose an order for his discharge. The defendants, with the consent of their client, agreed to this, and received the money. They did not appear at the public examination of the bankrupt, and, before any application for his discharge had been made, the plaintiff brought an action to recover back the money from the defendants. Fry, L. J., held that the contract was illegal, in that it was an interference with the course of justice and that the partial performance of it prevented the plaintiff from recovering back the money paid under it.

See also Norbeck & Nicholson Co. v. State (1913) 32 S. D. 189, 142 N. W. 847.

verdict according to the instructions of the court, and a judgment being rendered thereon, the plaintiff appealed to this court.

There is no doubt that the contract for the purchase of the lottery tickets was void, and that the execution of the notes for the price imposed upon the plaintiff no legal obligation to pay the money. But whether, after the money was paid, he can sustain an action to recover it back, is a distinct question; for it is not in every case where money has been paid upon a contract which is void, that such an action can be sustained. It may, however, in some cases be done.

If both parties are equally guilty of a breach of the law, a court of justice cannot interpose its aid in behalf of either; for it is a settled rule, that pari delicto potior est conditio defendentis, but where the transaction is in violation of a law made for the protection of one party against the acts of the other, they are not equally guilty, and the innocent party, when he has paid money upon such a transaction, may, without doubt, recover it back. Of this character are usurious loans, a familiar example, in which, according to every day's practice, the borrower is permitted to recover back the excess he may have paid beyond the principal and legal interest, and the sale of a lottery ticket, in a lottery not authorized by law, is, we apprehend, a transaction of the same character. The act of 1769, for preventing and suppressing private lotteries, which was the law in force at the time of the contract in this case, appears manifestly, from the preamble of the act, to have been designed by the legislature to protect the interest of others against the devices of those who should set up a lottery; and the enacting clause is made to operate upon the latter only. For it is only persons who set up the lottery, and not those who purchase the tickets, that offend against the provisions of the act.

We are, therefore, of opinion that the plaintiff in the circuit court had a right to recover, and that the circuit court erred in instructing the jury otherwise. But this recovery must be restricted to the money he paid without suit, and cannot be extended to that which he paid in satisfaction of the judgment before a justice of the peace.

The judgment having been given by a tribunal of competent jurisdiction, it is conclusive upon the parties, and they cannot be permitted to enquire into the merits, or to impeach its justice in another suit.

The judgment must be reversed with costs, and the cause remanded, that a new trial may be had not inconsistent with this opinion.[34]

[34] Accord: Jacques v. Golightly (1776) 2 Wm. Bl. 1073; Browning v. Morris (1778) Cowp. 790 (semble); Becker v. Wilcox (1908) 81 Neb. 476, 116 N. W. 160, 16 L. R. A. (N. S.) 571, 129 Am. St. Rep. 690.

In Browning v. Morris, supra, Lord Mansfield said: "The rule is, in pari delicto, potior est conditio defendentis: and there are several other maxims of the same kind. Where the contract is executed, and the money paid in pari delicto, this rule, as Mr. Dunning contended, certainly holds: and the party who has paid it, cannot recover it back. For instance in bribery, if a man pays a sum of money by way of a bribe, he can never recover it in an action; because both plaintiff and defendant are equally criminal. But, where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the

LADD v. BARTON.

(Supreme Court of New Hampshire, 1886. 64 N. H. 613, 6 Atl. 483.)

Assumpsit, for $100, money had and received. Facts found by the court.

DOE, C. J. The defendant obtained the pension for the plaintiff, and received $10 from the government, and $100 from the plaintiff. Both parties understood that it would be unlawful for the defendant to receive for his services in a pension case a greater sum than $10, (Rev. St. U. S. §§ 4785, 4786, 5485; Act June 20, 1878 [U. S. Comp. St. 1913, §§ 9112, 9115, 9114],) and that the sum of $100, though paid voluntarily, without demand or undue influence, was paid and received as compensation for the defendant's services in the plaintiff's case. The amount of the fee is fixed for the protection of the pensioner, as the rate of interest is fixed by the usury law for the protection of the borrower; and the parties were not in equal fault. State v. Rand, 51 N. H. 361, 12 Am. Rep. 127. The right of pensioners to recover in such cases as this is necessary for the protection the statute was intended to give them.

Judgment for the plaintiff.[35]

one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there, the parties are not in pari delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract. For instance, by the Statute of Usury, taking more than 5 per cent. is declared illegal, and the contract void, but these statutes were made, to protect needy and necessitous persons from the oppression of usurers and monied men, who are eager to take advantage of the distress of others; whilst they, on the other hand, from the pressure of their distress, are already to come into any terms, and, with their eyes open, not only break the law, but complete their ruin. Therefore, the party injured may bring an action for the excess of interest."

In Michener v. Watts (1911) 176 Ind. 376, 96 N. E. 127, 36 L. R. A. (N. S.) 142, a statute made it a misdemeanor to sell a patent right without first filing with the clerk of the county, a copy of the letters patent duly authenticated, and an affidavit that the same was genuine. The plaintiff bought a patent right from the defendant. Upon discovery that the patent was not filed plaintiff brought suit to recover the money paid by him for such patent right. The court held for plaintiff saying: "Where a contract is prohibited by a positive statute, enacted to protect the vendee as against the vendor, as in this case, the parties have been held not to be in pari delicto, and the person for whose protection the statute was enacted has been permitted to recover the money or property parted with by him."

[35] Accord on identical facts: Smart v. White (1882) 73 Me. 332, 40 Am. Rep. 356; Peters, J., saying: "The parties do not stand in pari delicto. The penalty of the statute is levelled at him and not at her. The punishment is to be inflicted upon the taker and not upon the giver. She is to be protected, not punished. Her ignorance of the law, or her folly, if not ignorant of it, is excusable, but his is not. He commits a wrong; she does not. She cannot defraud herself. The statute would be nullified by a different interpretation."

The recovery of usurious payments and of illegal payments extorted by duress are considered in chapter V, section 4, infra.

WEBB v. FULCHIRE.

(Supreme Court of North Carolina, 1843. 25 N. C. 485, 40 Am. Dec. 419.)

Appeal from the Superior Court of Law of Onslow County, at Spring Term, 1843, his Honor Judge Bailey presiding.

This was an action of assumpsit, brought by the plaintiff to recover the sum of forty dollars. The jury found a verdict for the plaintiff, subject to the opinion of the court on the following facts. The defendant had three acorn cups and a white ball, which he placed under one of the cups in the presence of the plaintiff. The defendant proposed to bet the plaintiff twenty dollars, that he could not tell which one of the three cups the ball was under. The plaintiff bet him that he could, and thereupon staked twenty dollars. The plaintiff pointed to the cup, and bet that the ball was under that one. The defendant raised the cup and the ball was not there. The money staked was then paid over to the defendant as being won by him. In the same way the defendant won twenty dollars more, which was in like manner paid over to him. The court was of opinion that the plaintiff could not maintain this action, and set aside the verdict and entered a nonsuit. From this judgment the plaintiff appealed.

RUFFIN, C. J. It is not denied that the law gives no action to a party to an illegal contract, either to enforce it directly, or to recover back money paid on it after its execution. Nor is it doubted, that money, fairly lost at play at a forbidden game and paid, cannot be recovered back in an action for money had and received. But it is perfectly certain that money, won by cheating at any kind of game, whether allowed or forbidden, and paid by the loser without a knowledge of the fraud, may be recovered. A wager won by such undue means is not won in the view of the law, and, therefore, the money is paid without consideration and by mistake, and may be recovered back. That, we think, was plainly this case. The bet was, that the plaintiff could not tell which of the three cups covered the ball. Well, the case states that the defendant put the ball under a particular one of the cups, and, then, that the plaintiff selected that cup, as the one under which the ball was. Thus we must understand the case, because it states as a fact, that the defendant "placed the ball under one of the cups," and that the plaintiff "pointed to the cup," that is, the one under which he had seen the ball put, as being that which still covered it. We are not told how this matter was managed, nor do we pretend to know the secret. But it is indubitable, that the ball was, by deceit, not put under the cup, as the defendant had made the plaintiff believe, and under which belief he had drawn him into the wager; or that, after it was so placed, it was privily and artfully removed either before or at the time the cup was raised. If the former be the truth of the case, there was a false practice and gross deception upon the very point, that induced the laying of the wager, namely,

that the ball was actually put under the cup. For clearly, the words and acts of the defendant amount to a representation, that such was the fact; and indeed the case states it as the fact. Hence, and because we cannot suppose the vision of the plaintiff to have been so illuded, we rather presume the truth to be, that the ball was actually placed where the defendant pretended to place it, that is to say, under the particular cup which the plaintiff designated as covering it. Then the case states that the defendant raised that cup, and the ball was not there; a physical impossibility, unless it had been removed by some contrivance and sleight of hand by the defendant. Unquestionably it was effected by some such means; for presently we find the defendant in possession of the ball, ready for a repetition of the bet and the same artifice. Such a transaction cannot for a moment be regarded as a wager, depending on a future and uncertain event; but it was only a pretended wager, to be determined by a contingency in shew only, but in fact by a trick in jugglery by one of the parties, practised upon the unknowing and unsuspecting simplicity and credulity of the other. Surely, the artless fool, who seems to have been alike bereft of his senses and his money, is not to be deemed a partaker in the same crime, in pari delicto, with the juggling knave, who gulled and fleeced him. The whole was a downright and undeniable cheat; and the plaintiff parted with his money under the mistaken belief, that it had been fairly won from him, and, therefore, may recover it back.

The judgment of nonsuit is reversed, and judgment for the plaintiff according to the verdict.

PER CURIAM. Judgment below reversed and judgment for the plaintiff.[36]

HERMANN v. CHARLESWORTH.

(King's Bench Division. [1905] 2 K. B. 123.)

COLLINS, M. R.[37] This is an appeal from the judgment of the Divisional Court reversing the decision of the county court judge. The circumstances are shortly these: The defendant was a marriage advertising agent. The plaintiff was a lady who was desirous of getting married, and she was attracted by an advertisement in a paper of which the defendant was proprietor, and she got into communication with him. The result was that the defendant undertook to assist her in getting married by means of introductions to gentlemen, and she agreed to pay him £250. in the event of a marriage taking place as the result of the introductions. She also agreed to pay the

[36] See also Catts v. Phalen (1844) 2 How. 376, 11 L. Ed. 306; In re E. J. Arnold & Co. (D. C. 1904) 133 Fed. 789. Both of these cases are stated and discussed in Stewart v. Wright, at page 292, infra.

[37] The statement of facts, the concurring opinions of Mathew and Cozens-Hardy, L. JJ., and portions of the opinion of Collins, M. R., are omitted.

defendant as a "special client's fee" the sum of £52., which was sent to him by cheque, the receipt of which the defendant acknowledged in a letter in which he said that £47. was to be returned if no engagement or marriage took place within nine months. The defendant gave her various introductions, but at the end of four months the lady thought better of it and demanded back the money. The county court judge came to the conclusion that the plaintiff was entitled to recover the money on the ground that the contract was a marriage brokage contract, which the law would certainly not assist towards its accomplishment; that it was a contract upon which the law looked with dislike and would assist the party who was induced to enter into it to undo it.

The Divisional Court came to the conclusion that the particular arrangement in this case to procure introductions with a view to marriage giving the lady a choice among the persons introduced to her, was not within the mischief attributed to marriage brokage contracts. As I understand, they took the view that a marriage brokage contract was confined to the case of a contract to procure marriage with one particular person. Going back to the principle on which this branch of the law as to such contracts rests, I am unable to find any ground for that distinction. It seems to me that the principle is as much violated in the class of cases to which the present one belongs as in cases where the contract relates to bringing about a marriage with a particular individual. * * * Many elements have no doubt entered into the judgments in different cases, but at the root of the question of the illegality of a marriage brokage contract is the introduction of the consideration of a money payment into that which should be free from any such taint. No doubt, apart from that fundamental objection, other elements may intervene, such as an abuse of the power of influencing possessed by a parent or guardian or other person having that power; but those are illustrations of the mischief, and not the ground on which the principle is founded. * * *

In my opinion, both on principle and authority, the transaction in this case comes within the rule which invalidates marriage brokage contracts.

From the point of view that I take there arises a question which it was not necessary to discuss in the Court below. Assuming that the contract was illegal, it has been contended that there has been such part performance of the contract that the plaintiff cannot insist upon having it undone. The principle relied on is that a person allegans suam turpitudinem non est audiendus. It is said that this lady comes to the Court setting up the fact that she was party to an illegal contract and asking for relief, and that she should not be allowed to do so, for though it is true that in modern times persons have been allowed to resile from illegal contracts, they cannot do so if any part of the illegal purpose has been accomplished. Here it is said that the lady has had the benefit of the introductions contracted for, and of the

trouble and expense incurred by the defendant, and that it is to late for her to resile from the contract. The answer on behalf of the plaintiff is put on two grounds. First, it is put upon her common law right to recover money deposited to abide the result of an event that has never happened. It is urged that she deposited money with the defendant to be kept by him only on the happening of a certain event, that the object for which she deposited the money was illegal, that in point of law there was no contract, and that it was competent to her to revoke it at any time before the event; that she had revoked it, and was therefore entitled to get back the money that she had paid.

For authority on this point I may refer to the judgment of Lord Justice Stirling, then Mr. Justice Stirling, in Barclay v. Pearson, [1893] 2 Ch. 154. The learned judge after considering several cases, referred to the decision of Littledale, J., in Hastelow v. Jackson, 8 B. & C. 221, 32 R. R. 369, in these terms: "Hastelow v. Jackson, 8 B. & C. 221, 32 R. R. 369, was an action in which the plaintiff and one Wilcoxon deposited money in the hands of a stakeholder to abide the event of a boxing match between them, and after the battle the plaintiff demanded the whole sum from the stakeholder, and threatened him with an action if he paid it over to Wilcoxon. This he nevertheless did by the direction of the umpire, and it was held that the plaintiff was entitled to recover from him his own stake as money had and received to his use. Mr. Justice Littledale stated the law very clearly and shortly thus: 'If two parties enter into an illegal contract, and money is paid upon it by one to the other, that may be recovered back before the execution of the contract, but not afterwards. In the case of persons entering into such a contract and paying money to a stakeholder, if the event happens and the money is paid over without dispute, that is considered as a complete execution of the contract, and the money cannot be reclaimed; but if the event has not happened, the money may be recovered. With respect to a stakeholder there is a third case, viz., where the event has happened, but before the money has been paid over, one party expresses his dissent from the payment. Under such circumstances he may recover it; and perhaps it may then be said, that although the event has happened, yet the contract is not completely executed until the money has been paid over, and therefore the party may retract at any time before that has been done.'" Other authorities have been referred to, notably Tappenden v. Randall, 2 Bos. & P. 467; 5 R. R. 662.

Upon this ground the common law position of the plaintiff is made good. In terms the money was deposited to abide the event of a marriage taking place, and the deposit had nothing to do with work and labour to be done. The contract itself was simply a wagering contract, and the defendant was to hold the money as stakeholder till the event happened. If the event took place the money was to remain with the defendant, and if it did not take place the plaintiff, unless she is prevented from claiming relief, can recover it back. In

answer to the suggestion that something has been done under the contract, the plaintiff may say that it was no part of the contract that the defendant should make the introductions, and that the steps he took were outside the contract and taken in his own interest to improve his chance of winning the wager, and that being so the event contemplated by the contract had not happened. That seems to me to be a good point; but I do not propose to rest my judgment on that ground only, because there is a wider ground. I refer to the attitude that the Courts of Equity have taken up with regard to the particular mischief arising on marriage brokage contracts. There was no objection at common law, till perhaps some hundred years ago, to such contracts; but the Courts of Equity took a different view, and in consequence the Courts of Common Law modified their view of the matter and shaped their course accordingly. Equity did not take the view that in the case of a contract of this particular kind, tainted with illegality, a case for relief could only be considered where there had been a total failure of consideration.

As was pointed out by Lord Hardwicke in Cole v. Gibson, 1 Ves. Sen. 503, equity reserves to itself the right to intervene even when something has been done in part performance of the contract, or even when the marriage has taken place. That the Courts took a special view of this class of contract appears from many decisions to which reference was made in the course of the argument. For instance, in Arundel v. Trevillian, 1 Rep. Ch. (3d Ed.) p. 47, a bond was set aside, and it appears from the report that the marriage had taken place. In Smith v. Bruning, 2 Vern. 392, a bond was ordered to be given up and a gratuity to be repaid. In Drury v. Hooke, 1 Vern. 412, a bond was ordered to be given up after the marriage had taken place. The principle upon which the Courts of Equity proceeded is forcibly expressed by Sir Joseph Jekyll, M. R., in Roberts v. Roberts, 3 P. Wms. 66, a decision given in the year 1730. "It is most true," said the learned judge, "that equity does abhor all underhand agreements in cases of marriage; and perhaps, this may be the only instance in equity, where a person, though particeps criminis, shall yet be allowed to avoid his own acts." In Tappenden v. Randall, 2 Bos. & P. 467, 5 R. R. 662, Heath, J., said: "It seems to me that the distinction adopted by Mr. Justice Buller between contracts executory and executed, if taken with those modifications which he would have necessarily applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the Court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person.[38] But

[38] In Chapman v. Haley (1904) 117 Ky. 1004, 80 S. W. 190, 4 Ann. Cas. 712, the defendant offered to sell plaintiff counterfeit money (as the court found) and plaintiff gave defendant $300, the latter promising to return in twenty minutes with $3,000 of the counterfeit money. Defendant did not return, and plaintiff did not see or hear of him till several years later. Upon discovering

where nothing of that kind occurs, I think there ought to be a locus pœnitentiæ, and that a party should not be compelled against his will to adhere to the contract." In Reynell v. Sprye, (1852) 1 D. M., & G. 660, at p. 679, Knight Bruce, L. J., points out that where the parties to a contract against public policy, or illegal, are not in pari delicto, and where public policy is considered as advanced by allowing either, or at least the more excusable of the two, to sue for relief against the transaction, relief is given to him. I cite these cases to shew that the jurisdiction exercised by the Courts of Equity was broader than that of the Common Law Courts, and was not bound by the hard and fast rule that if anything had been done in the furtherance of an illegal contract the Court would not intervene.

I come now to more modern cases. In Taylor v. Bowers, 1 Q. B. D. 291, at p. 300, Mellish, L. J., said: "If money is paid or goods delivered for an illegal purpose, the person who had so paid the money or delivered the goods may recover them back before the illegal purpose is carried out, but if he waits till the illegal purpose is carried out or if he seeks to enforce the illegal transaction, in neither case can he maintain an action; the law will not allow that to be done." In that case it was clear that some consideration had passed because in pursuance of the agreement the goods of the debtor had been removed and warehoused; but that was not allowed to interfere with the decision of the Court, for, having regard to the main object of the agreement, no part of that had been accomplished. How far is that qualified by the decision in Kearley v. Thomson, 24 Q. B. D. 742,[39] which was also a decision of the Court of Appeal? Fry, L. J., took exception to the statement of Mellish, L. J., in the former case; but it is to be observed that in the later case the illegal purpose, which was to defeat creditors, had been largely accomplished, for the contract was that the defendants should not appear at the public examination of the bankrupt, and that contract to abstain from appearing had been carried out. If, therefore, the dicta of the Lord Justice controlled us, they do not apply to the present case, in which, the object being to bring about a marriage, it could not be performed in part. It seems to me that, whether this case is regarded from the point of view of the common law or from the broader point of view of the Courts of Equity, we are entitled to grant the relief asked for, and are not debarred from doing so by reason that the defendant has taken certain steps and incurred some expense towards carrying out his part of the contract. On these grounds I have come to the conclusion that this appeal should be allowed. Appeal allowed.[40]

defendant, the plaintiff sued to recover the $300 advanced. The opinion, denying a recovery, discusses "The Highwayman's Case" (9 Law Quarterly Review, 197) and others of similar character.

[39] The facts of Kearley v. Thompson are stated in a note, page 278, supra.

[40] Accord: Duval v. Wellman (1891) 124 N. Y. 156, 26 N. E. 343; Wenninger

STEWART v. WRIGHT.

(Circuit Court of Appeals of the United States, Eighth Circuit, 1906. 147 Fed. 321, 77 C. C. A. 499.)

In Error to the Circuit Court of the United States for the Southwestern Division of the Western District of Missouri.

This was an action by Wright against Joseph C. Stewart, James P. Stewart, and the Exchange Bank of Webb City, a Missouri corporation, to recover the sum of $5,100, alleged to have been obtained from him by false and fraudulent pretenses. A jury was waived, and the cause was tried by the Circuit Court, which made a general finding, and rendered judgment in favor of the plaintiff. Wright v. Stewart (C. C.) 130 Fed. 905.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge.[41] The charge in the petition is that the defendants, Stewart and the bank, acting in combination and concert with a number of swindlers and confidence men, obtained from the plaintiff, Wright, the sum of $5,100, and that it was accomplished by means of a pretended foot race, the result of which was secretly arranged in advance, and by inducing the plaintiff through various false pretenses to place his money temporarily in the possession of one Boatright, the leader of the swindlers, who pretended to be acting as a stakeholder in the betting, and who promised to return the money so soon as it served the temporary purpose of relieving him (Boatright) from a false and simulated embarrassment arising out of the manipulation of the stake money in his hands.

For some years there existed in Webb City, Mo., an organization styled an athletic club, the ostensible purpose of which was the promotion of athletic sports and pastimes. It was really an organized band of swindlers, some of whom masqueraded as wealthy miners, and so notorious did they become that they were commonly known in the community as the "Buckfoot gang," and their continued operations became an intolerable public scandal. The only branch of their operations with which we are concerned is the fake foot racing, so

v. Mitchell (1909) 139 Mo. App. 420, 122 S. W. 1130. But see Chalfant v. Payton (1883) 91 Ind. 202, 46 Am. Rep. 586.

In Duval v. Wellman, supra, the court said: "Where a party carries on a business of promoting marriage as the defendant appears to have done, it is plain to be seen that the natural tendency of such a business is immoral and it would be so clearly the policy of the law to suppress it and public interest would be so greatly promoted by its suppression, that there would be no hesitation upon the part of the courts to aid the party who had patronized such a business by relieving him or her from all contracts made, and grant restitution of any money paid or property transferred. In that way only could the policy of the law be enforced, and public interests promoted. * * * Contracts of this sort are considered as fraudulent in their character, and parties who pay money for the purpose of procuring a husband or wife will be regarded as under a species of imposition or undue influence."

41 Portions of the opinions of Hook and Sanborn, JJ., are omitted.

called. Their plan was to entice men of means to Webb City, and deprive them of their money by various pretexts and devices in connection with foot races, the result of which was always secretly prearranged. Complaints and protests from the victims were sometimes met by threats, with a show of force. Their operations covered a wide territory, extending from Iowa to Texas, and they had a regular staff of decoys in the field. The victims were selected with great care, and various stories were told to induce them to go to Webb City. Their vanity and sympathy were sometimes played upon, and always their cupidity and desire for ill-gotten gain. Some of them were falsely assured at the outset that they were not expected to hazard their own money upon the races, but were told that it would be well for them to take along letters of credit or drafts, to impress the others at Webb City with their responsibility and financial standing. Sometimes the scheme outlined to the intended victims was that they assist in doing an act of justice to a foot racer of great merit who had been unfairly treated in the past, and who intended to match himself with one backed by the club, whom he could easily defeat. At other times the pretended purpose was to enable Boatright, the chief of the swindlers and the president of the club, to discipline his comembers, who were getting beyond his control, and this was to be accomplished by winning their money on a foot race, the result of which was prearranged, and after thus demonstrating that they were at his mercy the money should be returned. Sometimes the victim was induced to bet upon what he was led to believe was a certain and assured result of a foot race. In other instances he was to be a stakeholder, and in still others, as in the case at bar, he was, upon a promise of a percentage of the winnings, to handle and bet the money secretly furnished him by Boatright, who was to act as stakeholder, and pretended that he did not wish it known that he was doing the betting. But, however the scheme varied in its details, the ultimate purpose always in view was to beguile the victim to bring money or to arrange that drafts be honored by his home bank; to get actual possession of his money by some pretext or another when at Webb City, and in doing so to place him in such a position that to complain or make trouble for them he would have to admit his own moral obliquity. They seemed to be vaguely aware of the maxim "in pari delicto," and prepared to use it as a shield of defense.

To induce a victim to bring letters of credit or drafts, or to arrange for the honoring of drafts by his home bank, it was represented that the advent of a stranger upon the scene, possessed, apparently, of considerable means, was essential to the consummation of the scheme. By slow, cautious, and progressive approach, and with the wiles employed by confidence men, they generally succeeded in securing the trust of the victim, and he was induced to go to Webb City with one or more of the decoys. In some instances, as in the case at bar, they

were met outside of the city by Boatright, who would hand the victim several thousand dollars in currency to wager upon a race, the result of which was alleged to be not in doubt. One of the numerous conspirators would then accompany the victim to the defendant bank to see that the money was safely deposited there, and it would be suggested to him that he exhibit to the bank officials, the Stewarts, proof of his own financial resources. He would then be conducted or directed across the street to a saloon, where the subject of foot racing would be casually mentioned, and where he would be introduced to Boatright as though they had met for the first time. The members of the band would quickly gather, and they would then adjourn to a room above the saloon, represented to be the headquarters of the club. A foot race would be arranged, the betting would grow fast and furious, and large sums of money would apparently be wagered. The victim would bet the money which had been given him by Boatright, and the latter would from time to time secretly pass him sums taken from the stakes or money which had already been wagered, and the victim would in turn wager them upon the result of the proposed race. Then some one with a quarrelsome and truculent manner would claim that he had made a bet which had not been recorded, and would demand a count of the money in the hands of Boatright in order to prove his assertion. Boatright, who is said to have been a consummate actor, would appear to be in great distress, and in fear of the vengeance of the others should they discover that he had abstracted money from the stakes and handed it to the stranger to be wagered. The victim would then be induced by Boatright's pleading to make drafts upon his own bank, which would be cashed at the defendant bank, and the money would be placed, as he supposed temporarily, in the hands of Boatright, to relieve the latter from his embarrassment. When this was done the disturbance would cease, and, if there was no chance to secure more money from the victim, the betting would be closed, the money would be quickly placed in a satchel, and deposited in a place safe from the reach of the victim—sometimes in the defendant bank. The crowd would then adjourn to the place where the pretended foot race was to be run, and the man who the victim thought would win the race would fall down or otherwise fail in his pretended endeavor. It would then be claimed that the victim had wagered his money on the race, and if he evinced a disposition to make trouble revolvers would be drawn, and he would be cowed into submission. This was but one of the various methods employed to rob the victims of their money. The details of the scheme were frequently changed to suit the exigencies of the particular case, but the result was always the same. No stranger ever won anything, and none ever escaped without being defrauded. In some cases their money was given up under circumstances almost amounting to duress. We need not further particularize the facts in Wright's case, except to say that, while protesting that he was being

robbed and demanding the return of his money, he was nevertheless induced to hold one end of the string at the pretended foot race.[42] * * *

But it is said that Wright should be denied relief because of the maxim "In pari delicto potior est conditio defendentis." It was an essential part of the scheme to defraud that the victim should be led on by degrees to place himself in such a position that he would be prevented from having recourse to the courts. And this defense, so contrived in advance, is now produced for recognition, and it is said that, the plaintiff being equally culpable with the conspirators, a court of justice should therefore leave him where it finds him. It must be admitted that when Wright left his home for Webb City he thought he was going to participate in an unlawful scheme to defraud others. But, after all, it amounted to nothing more than a mere belief on his part. That he was betting upon a foot race at Webb City was but a figment of his imagination. In reality there was no betting and no foot race, and it was not intended that there should be. It was all a pretense and a sham. He was merely a puppet, who was acting the will of the conspirators to his own undoing. The real design behind the scenes was one in which Wright did not participate except as the victim. If he was particeps criminis, it was to an offense against himself. Boatright and his associates sought Wright in his home, awakened in him a desire for wrongful gain that might otherwise have remained dormant, inspired in his mind an unfounded idea that he was going to secure it, and then by fraud and false pretenses deprived him of his money. We are unable to agree with counsel that the victim was in equal wrong with those who despoiled him merely because, at their instance, and as a result of their wiles, he entertained a purpose which it was never intended he should consummate. To hold otherwise would be to accord too much weight to the unsubstantial, and to enable those whose active occupation was swindling to successfully avail themselves of the false position in which, as part of their predetermined scheme, they succeeded in placing others they intended to defraud. Courts of justice should not thus reward criminal ingenuity. This is not a case in which, two persons having conspired to rob an innocent third, one of the two robs the other. The pretended miners, who were members of the counterfeit athletic club, and against whose wealth Boatright falsely assumed to direct his designs, were in fact his criminal accomplices. They were confidence men, not miners. They, as well as the defendants, played their part in the scheme to defraud, the whole machinery of which was employed, not against themselves, but against their victim.

We are also of the opinion that, viewing the conduct of Wright in its most reprehensible light, nevertheless the interest and welfare of

[42] The learned judge found that the defendants Stewart were the directors of the defendant bank and the owners of nearly all its stock; also that they were familiar with the practices of Boatright and his associates and were in the habit of assisting them in their fraudulent scheme.

the public would be better subserved by causing the loss to fall upon those who aided and assisted in criminal practices followed as an occupation than by the punishment of the individual victim. It would be doubtful wisdom to extend encouragement to organizations of confidence men, who prey upon the public, by allowing them the use of the rule "in pari delicto" as a shield of defense, when a part of the scheme they employ is to place those they seek and then defraud in the position they rely on.

These conclusions are abundantly supported by authority. The rule which declares that when parties are in equal wrong the position of the defendant is the better, and that the courts will not allow their machinery to be used for the relief of one who has been defrauded in a corrupt or illegal transaction in which he participated, is based not upon statutory provisions, but upon general principles of public policy. It is therefore not for the sake of the defendant that the rule is enforced, but to promote the general good. And when the objection is urged by the defendant, or is suggested by the court of its own motion, two questions present themselves for consideration: Were the parties in equal wrong, or was there such fraud, deceit, oppression, or inequality as challenges the attention of a court of justice? If they appear to be in equal wrong, will nevertheless a wise regard for the general welfare be better subserved by the punishment of the defendant than by denial of relief to the complaining party?

In 1 Story, Eq. Jur. § 300, it is said: "And indeed in cases where both parties are in delicto, concurring in an illegal act, it does not always follow that they stand in pari delicto, for there may be, and often are, very different degrees in their guilt. One party may act under circumstances of oppression, hardship, undue influence, or great inequality of condition or age, so that his guilt may be far less in degree than that of his associate in the offense. And, besides, there may be on the part of the court itself a necessity of supporting the public interests or public policy in many cases, however reprehensible the acts of the parties may be."

The same doctrine is recognized by Pomeroy: "Even when the contracting parties are in pari delicto, the courts may interfere from motives of public policy. 'Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him.'" 2 Pomeroy, Eq. Jur. § 941. * * *

The precise questions now before us were presented upon similar facts to the Supreme Courts of Missouri and Arkansas. Hobbs v. Boatright et al., 195 Mo. 693, 93 S. W. 934, 5 L. R. A. (N. S.) 906, 113 Am. St. Rep. 709, and Lockman v. Cobb, 77 Ark. 279, 91 S. W. 546. In the Hobbs Case the Missouri court affirmed a judgment against the Exchange Bank and Stewart, its cashier, upon evidence which is said by that court to be substantially the same as in the case now before us. Hobbs was one of the numerous victims of Boatright

and his co-conspirators. Referring to the general rule, that court said that it "should not be applied in a case in which to withhold relief would to a greater extent offend public morals." And it put this question and answered it against the defendants: "Will we promote good morals to say to this gang and their friends and abettors, you have so debauched and degraded your victim that the law will not touch him or hear his complaint; therefore you may go free, keep what you took from him, and look out for another victim?"

In the Arkansas case Cobb was defrauded by some of Boatright's active assistants, who seem to have engaged for the time being in business on their own account. The methods employed were like those in the case at bar, and the same defense was urged against recovery. The Supreme Court of that state said: "In what wrong or crime were the plaintiff and defendants in pari delicto? If any, it was a conspiracy by the defendants to defraud the plaintiff and to steal his money; to obtain by deceit and falsehood the money of plaintiff by inducing him to believe that a foot race was to be run, and that they were actually wagering their money, one against the other, upon it; and to induce him to believe he was betting upon a foot race. He did not participate in this conspiracy, and could not possibly have done so. * * * By fraud and deceit they caused him to make a pretended wager, and robbed him of his money, pretending that he had lost it. He might have intended to wager if he had the opportunity, but intention without any act to carry it into effect does not constitute a crime or a wrong, and he was not in pari delicto with the defendants." * * *

In re Arnold (D. C.) 133 Fed. 789. In this case the bankrupts, by representing that they were engaged in conducting a racing stable, betting on races, etc., that they had exceptional facilities for making money by this means, and that their profits enabled them to pay large returns, secured from the public deposits of large sums of money to be used in their business. Among the depositors was the claimant. His claim was objected to on the ground that the business of the bankrupts was illegal, and he knew it. It was found, however, that many of the most material representations which induced the deposits were entirely false; that the racing was but an incidental feature of their scheme, and that they were really paying the pretended dividends out of the moneys deposited, and not out of profits made. It was contended that the bankrupts and the claimant were engaged in a gambling venture, and were in pari delicto. Judge Adams, now of this court, held that this view was altogether too superficial. He applied the doctrine announced by the Supreme Court of Vermont in Hinsdill v. White, supra [34 Vt. 558], and allowed the claim.

In Catts v. Phalen, 2 How. (U. S.) 376, 11 L. Ed. 306, the defendant was employed to draw numbers from a lottery wheel. He secretly employed an outsider to purchase a lottery ticket for him, and when the drawing came off he concealed in the cuff of his coat a false ticket,

with numbers corresponding to those on the ticket purchased, and then, slipping it to his fingers, he pretended to have drawn it from the wheel. He received a prize of $12,500. Upon discovery of the fraud an action was brought to recover the money. The case was considered upon the assumption that a legislative act had declared the lottery business to be illegal, and that defense was asserted. The Supreme Court held, however, that the money was paid to and received by the defendant on a false assertion of the fact that he had a ticket which was entitled to a prize; that the contract which the law raised between the parties was not founded on the drawing of the lottery, but on the obligation to refund the money, which had been received by falsehood and fraud, and by the assertion of a drawing which never took place. The court said that to state is to decide such a case, and it was held that the plaintiffs could recover. Many other authorities may be found in the opinion of the learned district judge before whom this case was tried. 130 Fed. 905.

The clear distinction between the relation of Wright, upon the one hand, and that of Boatright and his associates, upon the other, to the fraudulent transactions by which the former was deprived of his money is further illustrated by the aspect in which such transactions have been regarded by many of the courts. In accordance with their decisions, Boatright and his associates could have been charged with and convicted of the crime of larceny. It would seem anomalous if Wright were held to be particeps criminis to a larceny of his own money, and equally so if he were held to be in pari delicto with those who stole it. Conduct similar to that under consideration has been held to constitute larceny, even though the fraud or pretense practiced on the victim, and by which he was despoiled of his money, assumed the simulated form of a violation of the law, in which he participated.[43] * * *

It is also contended that a recovery by Wright is precluded by the maxim "ex dolo malo non oritur actio." This contention is in part answered by the authorities already reviewed, and by what we have said concerning the character of the transaction and Wright's connection with it. We are of the opinion that the maxim has no pertinency to a case like that before us. Its meaning is that a court will not lend its aid to one who founds his action upon an immoral or illegal act, and the test of its applicability is whether the plaintiff can make out his case otherwise than through the medium and by the aid of such an act, to which he himself was a party. Must he have the aid of the illegal transaction in order to recover? Has he founded his action upon it? Is he seeking to recover the avails or the results thereof?

Sir George Jessel thus expressed the doctrine in Sykes v. Beadon, L. R. 11 Ch. Div. 170, 197: "I think that the principle is clear that

[43] Citations of authorities omitted.

you cannot directly enforce an illegal contract, and you cannot ask the court to assist you in carrying it out. You cannot enforce it indirectly; that is, by claiming damages or compensation for the breach of it, or contribution from the persons making the profits realized from it."

It seems to us quite obvious that this doctrine does not touch the case at bar. This action was not brought to enforce a corrupt or illegal contract, or to secure any of the fruits thereof. Wright does not so found the action. He does not ask the court to recognize the propriety of his transaction, or to award him any portion of the plunder. He proceeds, not in affirmance or reliance, but wholly by way of repudiation, and seeks merely a restoration of that which was illegally taken from him by fraud and false pretense. The rule which controls cases like the one at bar is the rule of the lottery ticket case (Catts v. Phalen, supra). It was also expressed by the Supreme Court in National Bank & Loan Co. v. Petrie, 189 U. S. 423, 23 Sup. Ct. 512, 47 L. Ed. 879, where, omitting the citations, it was said: "The question then is, leaving on one side the averment just quoted from the answer, and assuming that the parties were attempting a transaction forbidden by the law, whether the nature of the attempt prevents one of them from withdrawing from the bargain on the ground of preliminary fraud. If the withdrawal were on the ground of repentance alone, the law might, or might not, leave the parties where it found them. But a person does not become an outlaw and lose all rights by doing an illegal act. The right not to be led by fraud to change one's situation is anterior to and independent of the contract. The fraud is a tort. Its usual consequence is that as between the parties the one who is defrauded has a right, if possible, to be restored to his former position. That right is not taken away because the consequence of its exercise will be the undoing of a forbidden deed. That is a consequence to which the law can have no objection, and the fraudulent party, who otherwise might have been allowed to disclaim any different obligation from that with which the other had been content, has lost his right to object because he has brought about the other's consent by wrong."

The court further observed: "Cases where the action is on the illegal contract do not apply." The transaction referred to in this case appears to have been completed, and not one in which one of the parties halted and repented during its progress. When attention is directed to the character of the cases in the Supreme Court which are relied upon to support the defense ex dolo malo, their inapplicability we think becomes apparent. In almost every instance the illegal bargain was the vehicle in which the plaintiff desired the court to move him to judgment. He founded his action upon it, and either directly or indirectly sought its enforcement. It is this that the Supreme Court holds cannot be done. * * *

The judgment of the Circuit Court is affirmed.

SANBORN, Circuit Judge (dissenting). The plaintiff agreed with Boatright that for 20 per cent. of their winnings he would wager Boatright's money on a fake foot race, which Boatright agreed to make certain to result in their favor, so that they could thereby defraud the miners who bet against them out of their money. The plaintiff wagered large sums of money which he knew Boatright fraudulently furnished to him from the stakes and some of his own money in the performance of this corrupt agreement. Boatright broke his contract, and fixed the race against him. The plaintiff made and performed his part of his illegal contract to defraud others. He participated in the betting for this purpose. His intent and his acts were no less criminal and fatal to his case because they proved abortive. Rex v. De Berranger, 3 M. & S. 72.

The result of the opinion of the majority is that the plaintiff may recover because the gambling was fraudulent, because while the plaintiff was performing his agreement to cheat others by the fraudulent device of inducing them to bet upon the fake foot race they were engaged in a like endeavor to defraud him by the same device; an endeavor in which they succeeded while he failed. It is that one who is defrauded in gaming while he is engaged in an endeavor to defraud others thereby may recover the losses he sustains. The argument is that the plaintiff was induced by fraud to make his corrupt agreement, and to perform his part of it by betting upon a fraudulent race, and that he was not gaming because the result was certain. But the same argument holds good in every case of foul play, because in every such case the losing gambler is induced to bet upon a sure thing by the fraudulent representation that the play will be fair. If this argument be sound, and if the conclusion in this case illustrates the true rule, every gambler may recover in the courts the losses he sustains upon fixed races, marked cards, or foul plays upon the ground that in such cases there is no uncertainty in the result, while in cases in which the races and plays are fair he is remediless; and henceforth the courts must, as Judge Sherwood said in Kitchen v. Greenabaum, 61 Mo. 115, "sit as the arbiters of the gaming table and the umpires of the prize ring," for they must hear the evidence upon and determine the issue in every losing gambler's case, whether the race or play was foul or fair, and give judgment for or against him accordingly. A rule and practice of this nature runs counter to my views of the law, to those of more eminent judges who have preceded me, and to the established rule that no cause of action lies for fraud which induces, or damage which results from, a contract or transaction which involves the moral turpitude of the plaintiff, or his violation of a general law of public policy.

In Babcock v. Thompson, 20 Mass. (3 Pick.) 446, 449, 15 Am. Dec. 235, this very question was considered and determined by the Supreme Court of Massachusetts. The plaintiff brought an action to recover from the defendant money lost in gaming by foul play. The court

said, by the mouth of Chief Justice Parker: "Here is a case of gaming accompanied with cheating. Clearly, if the gaming had been fair, the law would give no remedy. The only question then is, whether the fraud will alter the case. We think it will not. If a man thus voluntarily puts himself in a condition to be cheated, through his illegal act he cheats the government, and the other person cheats him, and they must be left to settle the affair between themselves."

In Abbe v. Marr, 14 Cal. 210, 212, the exact case before us was presented to the Supreme Court of California, which was then composed of Chief Justice Field, afterwards Mr. Justice Field of the Supreme Court, and Judges Baldwin and Cope. The members of a gang of swindlers, by false representations and promises that they had arranged to fix a horse race so that the plaintiffs' horse would surely win, induced them to bet their horses, cows, wood, and money on this race, and then they so fixed the race that the plaintiffs lost. They brought an action directly against the members of the gang to recover back their property. The court said: "No court of justice can listen to such a case. When the plaintiff asserts his own turpitude in this way he sends his case out of court. If in attempting, by way of reprisal or otherwise, to swindle another he becomes the victim of his own arts, it may become a question in morals or in honor which party is more culpable. Courts of law entertain no discussion on the subject, but terminate the controversy by shutting their doors in the face of the intruder." * * *

In Haynes v. Rudd, 102 N. Y. 372, 376, 7 N. E. 287, 55 Am. Rep. 815, the maker of a note brought an action against the payee to recover from him the amount which the maker had been obliged to pay to a bona fide holder of the note, which the defendant had induced him by threats and the inspiration of fear to make to compound a felony. The court refused to permit a recovery and said: "While fraud, duress, and undue influence employed in procuring a contract for the payment of money may vitiate and destroy the obligation created, and render it of no effect, and the party who has been compelled to pay money on account thereof may maintain an action to recover the same, such a right does not exist and cannot be enforced where the consideration of the contract thus made arises entirely upon, or is in any way affected by, the compounding of a felony."

Nor does such a right exist when the object of the fraud is to induce the victim to make and perform a contract to defraud others, or to conduct an illegal transaction in gaming, because he can do neither without himself violating the moral and the civil law, and shutting the doors of the courts against him. This conclusion is further sustained by the following rules of law and decisions of the courts.

1. Ex dolo malo non oritur actio. It is the settled public policy of the United States that its courts shall sustain no action, whether in tort or on contract, which arises out of the moral turpitude of the plaintiff, or from his violation of a general law of public policy, be-

cause the maintenance of such actions promotes violations of the moral law and of the civil law by inspiring the belief that one may safely violate both, since if he loses the courts will make him whole. This rule is not conditioned nor limited by the maxim, "In pari delicto potior est conditio defendentis," nor by any requirement that the guilt of the plaintiff must be equal to that of the defendant. Such a limitation would destroy the rule, because the cases are rare, perhaps none ever arises, in which the intelligence, knowledge, and situations of the parties are such that their guilt is equal.[43] * * *

2. The maintenance of actions to recover moneys or property lost or damages sustained through transactions or contracts wherein the plaintiffs are guilty of moral turpitude or of the violation of a general law of public policy is as imperatively prohibited by the foregoing rule as the maintenance of actions to enforce contracts of that nature.[43] * * *

3. No action lies for fraudulently inducing one to engage knowingly, or for damages resulting while one is knowingly engaged, in a contract or transaction which involves his own moral turpitude and his violation of general laws of public policy, because his own wrong and his violation of law repel him from the courts.[43] * * *

4. The maxim, "In pari delicto potior est conditio defendentis" is but a corollary to the general rule "Ex dolo malo non oritur actio," and it neither limits nor controls it. But if the act or contract from which one's cause of action springs be in itself immoral, or a violation of the general laws of public policy, he is in pari delicto, within the proper interpretation of this maxim, although his guilt may be incomparably less than that of the defendant. Thomas v. Richmond, 12 Wall. 349, 355, 20 L. Ed. 453; Smith v. Bromley, 2 Doug. 696, note; Harriman v. Northern Securities Co., 197 U. S. 244, 295, 25 Sup. Ct. 493, 49 L. Ed. 739, and authorities cited under rule 1. The test which determines whether or not a plaintiff is in pari delicto, within the true meaning of this maxim, is not whether his guilt is equal to that of the defendant, but whether or not the whole transaction upon which his case is founded can be portrayed to the court without disclosing his moral turpitude or his violation of a general law of public policy. Taylor v. Chester, L. R. 4 Q. B. 314, 315; Simpson v. Bloss, 7 Taunt. 256; Gregg v. Wyman, 58 Mass. (4 Cush.) 322, 326, and authorities there cited.[44]

[43] Citations of authorities omitted.

[44] "The true test for determining whether or not the plaintiff and the defendant were in pari delicto, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party. Simpson v. Bloss, 7 Taunt. 246; Fivaz v. Nicholls, 2 C. B. 501." Taylor v. Chester (1869) L. R. 4 Q. B. 309.

"It is argued on the plaintiff's behalf that the claim which he makes is for money had and received, traced distinctly to Thaxter's hands, and held by a contract tainted with no illegality; that the defendant, in order to resist the claim, is obliged to set up an illegal agreement, and rely upon it, and that this necessity is the test as to the equality of the delict. However ingenious

The rule of law which governs this case is one of public policy. All agree that the highest and broadest public policy forbids relief to the plaintiff, or the punishment of the defendants by the maintenance of a baseless action, in violation of any settled public policy of the nation evidenced by the uniform decisions of its Supreme Court. The opinion of the majority, however, is that it is the public policy of this nation to sustain actions arising out of contracts and transactions wherein the plaintiffs have been guilty of moral turpitude and of violation of general laws of public policy, such as those against gaming, unless the guilt of the plaintiffs is equal to that of the defendants, and even then whenever the judges who happen to try any particular case are of the opinion that the general welfare will be better subserved by the punishment of the defendant than by the denial of relief to the complaining party.

Public policy is not to be determined by the views which particular judges may entertain of the interests of the people, nor by general considerations tending to show what policy would probably be wise or unwise, because such a standard of determination might be unconsciously varied by the personal views of the judges who happen to constitute the court in each particular case. The public policy of the nation may be determined only by its Constitution, laws, and judicial decisions. Vidal v. Girard's Exr's, 2 How. 127, 197, 11 L. Ed. 205; Swann v. Swann (C. C.) 21 Fed. 299, 301; U. S. v. Freight Ass'n, 166 U. S. 340, 17 Sup. Ct. 540, 41 L. Ed. 1007; Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry. Co., 70 Fed. 201, 202, 17 C. C. A. 62, 63, 30 L. R. A. 193; Daniels v. Benedict, 97 Fed. 367, 372, 38 C. C. A. 592, 597.

Nor is the question here one of the public policy of the state of Missouri. This is an action between citizens of different states. It involves a question of general law, the public policy of the nation regarding the maintenance in its courts of actions for damages resulting from transactions wherein the plaintiffs are guilty of moral turpitude, as was the plaintiff in this case in making and performing his part of the agreement to defraud his associates by betting upon a fraudulent foot race. Hartford Fire Ins. Co. v. Chicago, Milwaukee & St. Paul Ry. Co., 70 Fed. 201, 202, 17 C. C. A. 62, 63, 30 L. R. A. 193. More-

this suggestion may be, it can hardly prevent the court from taking the whole transaction together, and considering what it is in substance and effect. The application of the maxim, in pari delicto, etc., does not depend upon any technical rule as to which party is the first to urge it upon the court in the pleadings. In practice, it is usually insisted upon by the defendant in answer to a prima facie case." Sampson v. Shaw (1869) 101 Mass. 145, 151, 3 Am. Rep. 327.

"It is true that a plaintiff can never recover where he has to trace his title through an illegal act. But it does not follow that he can recover where he technically avoids proof of the illegal act. The defendant can show that the plaintiff's evidence is not true. If the whole evidence, properly admissible on both sides, discloses the fact that the plaintiff's claim is founded in an illegal transaction, he cannot recover." Plaisted v. Palmer (1874) 63 Me. 576.

over, the state of Missouri has no settled public policy upon this question. * * *

In Holman v. Johnson, 1 Cowp. 343, Lord Mansfield declared the public policy which has ever prevailed in England in memorable words, which have been adopted by repeated decisions of the Supreme Court of the United States in cases which have involved this question. He said: "The objection that a contract is immoral or illegal as between plaintiff and defendant sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: 'Ex dolo malo non oritur actio.' No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it: for where both are equally in fault, potior est conditio defendentis."

It will be noticed that the basis of this rule is not the equality of the guilt of the parties to the action. The remark upon that subject presents the maxim "In pari delicto potior est conditio defendentis" as a mere corollary to the fundamental rule. By the terms of the statement of Lord Mansfield it neither conditions nor controls that rule. The rule is that the courts will not aid a plaintiff to maintain an action which arises out of his moral turpitude and the violation of a general law of public policy if his act or contract is stained with wrong, although his guilt may be less than that of the defendant, and the reason for it is that the maintenance of such actions necessarily promotes violations of both the moral and the civil law. It leads men to lay the flattering unction to their souls that they may safely violate the laws of both God and man because if they lose thereby the courts will fully indemnify them. This rule of public policy has been adopted and steadily maintained by the uniform decisions of the Supreme Court.[45] * * *

The Supreme Court, so far as the decisions cited or discovered indicate, has never departed from this rule. There are two cases in which the plaintiffs had been guilty of no moral turpitude and had violated no general law of public policy wherein they were permitted to recover the value of the property they had delivered to corporations

[45] The learned judge here discussed Coppell v. Hall (1868) 7 Wall. 542, 19 L. Ed. 244, and Thomas v. Richmond (1870) 12 Wall. 349, 20 L. Ed. 453.

under contracts that were simply beyond the powers of those corporations. These cases are Spring Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347, where the plaintiff recovered back an installment of 20 per cent. of the par value of stock which he had agreed to take, but which the corporation had no lawful authority to issue and did not issue, and Pullman's Car Co. v. Transportation Co., 171 U. S. 138, 151, 18 Sup. Ct. 808, 43 L. Ed. 108, in which the transportation company was permitted to recover the value of property which it had delivered under a contract beyond the powers of the corporation. But in each of these cases the Supreme Court was careful to reiterate the fundamental rule, and to declare that it would not be disregarded and its full effect would not be minimized. In the former case it said: "It is to be observed that the making of the illegal contract [the contract of subscription] was malum prohibitum and not malum in se. There is no moral turpitude in such a contract, nor is it of itself fraudulent, however much it may afford facilities for fraud." [46] * * *

The case of Catts v. Phalen, 2 How. 376, 11 L. Ed. 306, cited by the majority, rests upon the defendant's false representation that he had drawn a prize ticket when he had not, and upon the fact that the plaintiffs had no need to disclose their acts, if any, in violation of the statute against lotteries in order to sustain their action. They abandoned all the other counts in their complaint, and recovered upon the count for money had and received upon the sole ground that they had been induced to pay out their money long after the lottery had been drawn by the false representation of the defendant that he had drawn out the prize ticket. This case was decided in 1844, and if it has any further or different significance it has been overruled long since by the decisions of the Supreme Court which are here cited. * * *

Further, the maxim of equity analogous to the principle which governs this case is not "In pari delicto potior est conditio defendentis," but "He who comes into a court of equity must come with clean hands," and "He who has done iniquity cannot have equity." A court of equity repels from its precincts remediless the complainant who has been guilty of bad faith, fraud, or any unconscionable act in the transaction which forms the basis of his suit. 1 Pomeroy, Eq. Jur. pars. 397, 398, 400; Medicine Co. v. Wood, 108 U. S. 218, 227, 2 Sup. Ct. 436, 27 L. Ed. 706; Marble Co. v. Ripley, 10 Wall. 339, 357, 19 L. Ed. 955; Michigan Pipe Co. v. Fremont Ditch, etc., Co., 49 C. C. A. 324, 327, 111 Fed. 284, 287. "If a contract has been entered into through fraud, or to accomplish any fraudulent purpose, a court of equity will not, at the suit of one of the fraudulent parties—a particeps doli—while the agreement is still executory, either compel its execution or decree its cancellation, nor after it has been executed, set it aside, and thus re-

[46] On appeal from a previous trial of this case the New York Commission of Appeals denied a recovery, treating the contract as malum in se. Knowlton v. Congress & Empire Spring Co. (1874) 57 N. Y. 518.

store the plaintiff to the property or other interests which he had fraudulently transferred." 1 Pomeroy, Eq. Jur. par. 401.

If the decisions of the Supreme Court have not been misapprehended, they evidence a uniform and established public policy of the nation to refuse to maintain in its courts any action which is founded in a plaintiff's immoral contract or act, or in his contract or act violative of a general law of public policy. This rule of public policy is not conditioned or limited by any inquiry into the equality of the guilt of the plaintiff and the defendant. It applies wherever the plaintiff is particeps criminis, whatever the degree of his guilt. It forbids the maintenance of actions to repudiate or rescind corrupt contracts and transactions and to recover the money lost in their performance as imperatively as actions to enforce them. The plaintiff's cause of action is founded in his own moral turpitude in making and performing his part of the agreement to defraud his associate gamblers, and in a violation of the general laws of public policy against gambling, and it ought not to be maintained in a court of the United States. Its maintenance is controlled and forbidden by the principle, "Ex dolo malo non oritur actio." It is not governed or permitted by the maxim, "In pari delicto est conditio defendentis."

If, however, the view heretofore presented were mistaken and if the maxim "In pari delicto" could be lawfully applied to the decision of this case, it would still seem to me that there was no right of recovery in the plaintiff: (1) Because his contract and act to defraud the miners were immoral, and his betting was violative of a general law of public policy, and these facts place him in pari delicto, within the legal meaning of this maxim. Thomas v. Richmond, 12 Wall. 349, 355, 20 L. Ed. 453. (2) Because evidence of his acts of moral wrong and violation of a general law of public policy is essential to a proof of his cause of action, and this fact places him in pari delicto. Taylor v. Chester, L. R. 4 Q. B. 314, 315; Gregg v. Wyman, 58 Mass. (4 Cush.) 322, 326, and cases there cited. (3) Because if the court is to sit to determine whether the plaintiff or the defendants were the more guilty, the evidence appears to me to fix the heavier burden upon the former. The question is not whether the guilt of the members of the Buckfoot gang was equal to that of the plaintiff, but whether the guilt of the plaintiff was equal to that of these defendants. * * *

The principles, rules, and authorities to which reference has now been made have forced my mind to the conclusion that the plaintiff is entitled to no relief at the hands of the courts of the United States in this case because he was guilty of the moral turpitude of making and performing his part of his contract with Boatright to defraud the miners by a fixed foot race, and because he was guilty by his betting of violating a general law of public policy, and this contract and act constitute an inseparable part of his cause of action, because it was in the performance of them that he lost his money.

There is another reason why the judgment below should be reversed.

This is not an action for money had and received. The defendants have none of the money or property of the plaintiff. It is an action for damages for wrongful acts of the defendants. The only acts they performed in this case which could in any way have caused the plaintiff to lose his money were the statement of the cashier that Boatright was all right and the cashing of the drafts of the plaintiff upon his local bank. The plaintiff can recover nothing for the statement concerning Boatright, because he knew when it was made that it was false and that Boatright was a faithless rascal. He had made a contract with him to share the profits of the swindle he had agreed to perpetrate. He was not injured by that statement. The defendants violated no duty they owed to the plaintiff by cashing his drafts drawn upon his letter of credit from his local bank. The plaintiff had a right to draw his money from his local bank. If he had brought an action against that bank to recover the $5,000 which he had on deposit there, it would have been no defense to that action that he intended to bet his money on a fixed foot race, that he was sure to lose it, and that the bank knew it. No court would listen to such a defense. The defendants cannot be lawfully cast in damages for assisting the plaintiff to draw his money from the bank when they did nothing which a court would not have done in the face of a defense that the bank knew that he was about to lose the money on a fraudulent game. A plaintiff may recover the purchase price of goods which he sells and delivers to a defendant when he knows that the latter is to use them for an unlawful purpose. Holman v. Johnson, 1 Cowp. 341; Tracy v. Talmage, 14 N. Y. 162, 170, 67 Am. Dec. 132; Graves v. Johnson, 179 Mass. 53, 58, 60 N. E. 383, 88 Am. St. Rep. 355; Anheuser-Busch Brewing Ass'n v. Mason, 44 Minn. 318, 321, 46 N. W. 558, 9 L. R. A. 506, 20 Am. St. Rep. 580. And the bank cannot be legally liable for damages which result to a customer from his own folly in violating the moral and the civil law because it assists him by a lawful act to procure money which he is lawfully entitled to obtain, although it divines or knows that he is about to lose it in a transaction in which it takes no part and from which it receives no benefit.

In my opinion, the judgment against the bank and its officers is wrong, and it should be reversed.[47]

[47] In Hobbs v. Boatright (1906) 195 Mo. 693, 724, 93 S. W. 934, 938, 5 L. R. A. (N. S.) 906, 113 Am. St. Rep. 709, referred to in the principal case (page 291, supra), the court said: "If the case at bar disclosed but one transaction, if we should shut our eyes to the other transaction of like character that distinguished the history of this Buckfoot gang, if our whole attention was confined to the scheme entered into by the plaintiff with Wasser and Fisher in Oklahoma and the dénouement at Webb City, we could not say that one was less guilty than the other; it was a scheme of dishonest purpose and there is no justification of palliation of it, and if there was nothing else in the case to make the offense of one more enormous than the other we would not listen for a moment to the plaintiff's prayer for relief, and if we do listen to him and grant him what he asks it is not through any consideration of wrongs suffered by him but in tender consideration for the welfare of that community whose laws have been defied and whose public morals have been shocked by

WARE v. SPINNEY.

(Supreme Court of Kansas, 1907. 76 Kan. 289, 91 Pac. 787, 13 L. R. A. [N. S.] 267, 13 Ann. Cas. 1181.)

Error from District Court, Shawnee County; A. W. Dana, Judge.

Action by E. C. Spinney against M. Ware. Judgment for plaintiff, and defendant brings error.

Action to recover $2,500 given by Edmund C. Spinney to M. Ware for the alleged purpose of paying the necessary expenses incident to the convening of the board of directors of the National Aid Association, but which, it was alleged, was not used for that purpose, and that Ware had refused to account for or return the money upon demand. Ware's answer was a general denial.

On the trial it was shown that $150 was first paid, and later a payment of $2,350 was made, when the following receipt was given: "Topeka, Kans., Oct. 25, 1901. Received of E. C. Spinney, twenty-three hundred and fifty dollars ($2,350) to be used to pay necessary expenses of combining the management of the National Aid Asso. and the Bankers' Union of the World, as per contract, if such combination shall be effected, and to be returned to E. C. Spinney, in case it is not. [Signed] M. Ware. S. D. Cooley."

The trial court specially found that $850 of the money so received by Ware was expended for the purpose designated and that no part of the balance was thus expended. A demand for the return of the money was made before the institution of this action. Defendant contended that the money was given him to be expended in an unlawful way to induce a violation of a trust. The trial court awarded judgment for plaintiff for $1,650 and interest. The defendant brings error.

JOHNSTON, C. J.[48] * * * It is contended here that the transaction was not contrary to good morals. * * * Assuming, however, that the purpose was unlawful, as some of the testimony tends to show, Spinney was not barred from a recovery of so much of the money as was unexpended. The general rule is that the law will not aid either party to an illegal agreement, but an exception is made where the illegal agreement or purpose has not been carried out. This

this gang of bad men, and to bring them to the bar of justice. The learned law writer whose text we have last above quoted in section 941 (Pomeroy's Equity Jurisprudence) says: 'To the foregoing rules there is an important limitation. Even where the contracting parties are in pari delicto, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction then relief is given to him.' In the case before us we hold that public policy is advanced by allowing the plaintiff to recover the money of which he was defrauded."

See, also, Lockman v. Cobb (1905) 77 Ark. 279, 91 S. W. 546; Falkenberg v. Allen (1907) 18 Okl. 210, 90 Pac. 415, 10 L. R. A. (N. S.) 494.

Compare Schmitt v. Gibson (1910) 12 Cal. App. 407, 107 Pac. 571.

[48] The statement of facts is abridged and portions of the opinion are omitted.

was not an action to enforce the agreement between Spinney and his agent, Ware, nor is the judgment rendered by the court in any sense an affirmance of the agreement. Granting that the purpose of the parties is unlawful, the action is rather a repudiation of that purpose and a disaffirmance of the agreement. "The broad rule has been laid down that, when money or property is delivered by a principal to his agent for an illegal purpose or carrying into execution an illegal contract, the agent cannot set up such illegal object to prevent a recovery by the principal from the agent of such money or property so long as it remains in his hands." 15 A. & E. Encyc. of Law, 1009. In the note accompanying this text may be found a large number of sustaining authorities. The agent cannot retain the money merely because the transaction in contemplation was illegal. The illegality that defeats a recovery of the money is not in the intent alone. It has been well said: "Persons may not be punished either in civil or criminal courts for unlawful intentions. It is the consummation of these unlawful intentions that places a party without the law. If the unlawful intention is not carried out, if nothing is done under it, my servant has my property and I am entitled to its return. As in the present case he is acting under a special agency which I have a right to revoke at any time before the performance, and when so revoked I am entitled to my own. It cannot be better public policy to deny me a recovery of the stock than to encourage my agent to commit a criminal offense." Wassermann v. Sloss, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209.

Until the contemplated action is executed, the money converted to the illegal use, the parties are given an opportunity to repent and rescind, and the doctrine of locus pœnitentiæ, as it is called, is applied. "Seeing the error of his ways the law says a party may withdraw from the transaction; and it extends to him a helping hand by offering him the inducement of giving back to him anything of value with which he has parted." Wassermann v. Sloss, supra. The same view was well expressed by the Supreme Court of Maine where it was said that: "The law encourages a repudiation of the illegal contract, even by a guilty participator, as long as it remains an executory contract or the illegal purpose has not been put in operation. * * * It best comports with public policy to arrest the illegal transaction before it is consummated." Tyler v. Carlisle, 79 Me. 210, 9 Atl. 356, 1 Am. St. Rep. 301. In Morgan v. Groff, 4 Barb. (N. Y.) 524, it was said "that as long as the money deposited with an agent for an illegal purpose remains unemployed, or if the purpose be countermanded by the principal before its application, it is a debt which can be recovered from the agent by the principal, either at law or in equity."

The principle of these cases has been adopted and applied in this state. In the case of Hardy v. Jones, 63 Kan. 8, 64 Pac. 969, 88 Am. St. Rep. 223, an action was brought by a principal to require his agents to account to him for money placed in their hands to purchase prop-

erty at a judicial sale, under an agreement which had for its purpose the suppression of competition at the sale. After the sale there remained in the hands of the agents a portion of the fund placed in their hands, and they refused to account for this, on the ground that their agreement was void as against public policy. The court refused to listen to this reason or excuse, saying: "That as long as an illegal contract remains unexecuted neither party can be held to its terms. At any time before Hardy and Turbish had acted in behalf of Jones, the latter might have revoked their authority or they, upon their part, might have refused to execute their agency, but even in such case the agents could have been compelled to account to their principal for his money. So likewise will they be compelled to account for any unexpended balance remaining over from the execution of the illegal agreement. The surplus money now held by them is not held in pursuance of an illegal agreement to suppress competition at a judicial sale. The sale has been had, and the unexpended purchase money is now held by the plaintiff in error the same as they would hold any other money of the defendant in error." See, also, Pollock v. Agner, 54 Kan. 618, 38 Pac. 781; Peters v. Grim, 149 Pa. 164, 24 Atl. 192, 34 Am. St. Rep. 599; Adams Express Co. v. Reno, 48 Mo. 264; Bank v. Wallace, 61 N. H. 24; Norton v. Blinn, 39 Ohio St. 145; Kiewert v. Rindskopf, 46 Wis. 481, 1 N. W. 163, 32 Am. Rep. 731; Clarke v. Brown, 77 Ga. 606, 4 Am. St. Rep. 98; Congress, etc., Springs Co. v. Knowlton, 103 U. S. 49, 26 L. Ed. 347; Wood on Master and Servant, § 202; Dunlap's Paley on Agency, *66; 9 Cyc. 554–557.

The fact that Ware was an officer of and owed duties to the National Aid Association does not affect the application of the rule requiring him to account for the money received and not yet disbursed. It is assumed that he was acting unlawfully, but he was acting as the representative of Spinney, and held Spinney's money to be used for the purpose stated. Under the rule of the authorities, it is his duty to account to Spinney for the unexpended portion of the money, and this duty does not arise out of the illegal agreement and purpose, but out of the receipt and retention of the money of another, and which has not been converted to the proposed illegal use. * * *

The judgment will therefore be affirmed. All the Justices concurring.[49]

[49] In Morgan v. Groff (1848) 4 Barb. (N. Y.) 524, plaintiff gave his check for $50 to defendant, with instructions to make a bet therewith with one Thompson on the presidential election and to return the money if that bet was not made. Defendant, however, wagered the money with other persons and lost. Plaintiff was allowed to recover from defendant in money had and received, on the ground that the contract was still executory; the court saying: "If the defendant was merely the agent of the plaintiff in making the contemplated bet with Thompson—and this is all the proof makes out—the defendant cannot excuse himself from paying over the money, because it was sent to him for an illegal purpose. As long as money deposited with an agent for an illegal purpose remains unemployed, or if the purpose be countermanded

TENANT v. ELLIOTT.

(Court of Common Pleas, 1797. 1 Bos. & P. 2.)

Assumpsit for money had and received. Verdict for the plaintiff.

The defendant, being a broker, effected an insurance for the plaintiff, a British subject, on goods from Ostend to the East Indies, on board the "Koenitz," an Imperial ship. The ship being lost, the underwriters paid the amount of the insurance to the defendant, who, without any intimation from them to retain the money, refused to pay it over to the plaintiff.

Shepherd, Serjt., now moved for a rule to shew cause why the verdict in this case should not be set aside and a non-suit entered. By 7 Geo. I., stat. 1, c. 21, § 2, it is enacted: "That all contracts and agreements whatsoever made or entered into by any of His Majesty's subjects, or any person or persons in trust for them, for or upon the loan of any monies by way of bottomry on any ship or ships in the service of foreigners, and bound or designed to trade in the East Indies, or parts in the said act before mentioned; and all contracts and agreements whatsoever made by any of His Majesty's subjects, or any person or persons in trust for them, for the loading or supplying any such ship or ships with a cargo or lading of any sort of goods, merchandize, treasure, or effects, or with any provisions, stores, or necessaries, shall be and are hereby declared to be void." Now the goods on board the "Koenitz" being the property of the plaintiff, a subject of Great Britain, and the "Koenitz" being a foreign ship, bring this transaction within the provisions of the above act.

BULLER, J. Is the man who has paid over money to another's use to dispute the legality of the original consideration? Having once waived the legality, the money shall never come back into his hands again. Can the defendant then in conscience keep the money so paid? For what purpose should he retain it? To whom is he to pay it over, who is entitled to it but the plaintiff?

EYRE, Ch. J. The defendant is not like a stakeholder. The question is, Whether he who has received money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot.

The defendant took nothing by his motion.[50]

by the principal before its application, it is a debt which may be recovered from the agent by the principal, either at law or in equity."

See, also, Bone v. Ekless (1860) S., H. & N. 925, where a principal was allowed to recover from his agent money given the latter to bribe a Turkish official for the purpose of obtaining a contract with the Turkish government. The contract had been obtained, but the bribe had not yet been paid to the official.

[50] In Gordon v. Chief Commissioner of Metropolitan Police, [1910] 2 K. B. 1080, plaintiff won money by "street betting" in violation of a statute. This money was seized by the police in a raid and used as evidence in convicting plaintiff's agent, although plaintiff was acquitted. Plaintiff brought suit for

NORTON v. BLINN.

(Supreme Court of Ohio, 1883. 39 Ohio St. 145.)

Error to the District Court of Lucas County.

About the first of May, 1872, Chester Blinn placed in the hands of Jesse S. Norton, at Toledo, Ohio, the sum of $500 to be by him invested as agent for Blinn in options on wheat at Milwaukee, Wisconsin, or Chicago, Illinois, with instructions to invest the money as he would his own. Norton, through his brokers, James Keller & Co., immediately purchased in his own name, but for the sole benefit of Blinn, five thousand bushels of wheat at seller's option for June delivery at $1.42½ per bushel, and deposited the money of Blinn as a margin of ten cents per bushel. At the date for delivery the price of wheat had advanced so that a profit of $325 was realized on the transaction. This money, principal and profit, was reinvested by Norton in subsequent transaction of like nature for Blinn's benefit, but by reason of a decline in the market price of wheat in the latter part of June, the whole amount was lost.

These transactions were mere speculations or ventures on the future price of wheat, without any intention that the wheat would be either paid for or delivered, but with the intention that settlement between the buyer and seller would be made on the difference between the price stated in the contract and the market price at the date named for delivery. Such transactions were unlawful in the states of Illinois and Wisconsin, as well as in the state of Ohio.

The original suit was brought in the court of common pleas of Lucas county by Blinn against Norton to recover the sum of $825, (the sum advanced and profit on the first venture,) with interest.

On the trial testimony was offered by the plaintiff tending to prove that defendant had no authority to invest plaintiff's money save in a single purchase, namely, the purchase of 5,000 bushels as above stated, whereupon the plaintiff requested the court to instruct the jury as follows: "If the jury shall find from the testimony, that on or about the time stated in the petition, the defendant received from the plaintiff the sum of $500 of the money of the latter, under an arrangement that the same should be invested by the defendant in wheat transactions, of the illegal character mentioned in the answer, for the benefit of the plaintiff; that said money was so invested by the defendant, and a profit realized thereon; and that before the commencement of this action said sum of $500, and the profits so made, came into and are still in the hands of the defendant; or that he received credit therefor in the final settlement of his accounts with the brokers through whom said

the money and at the trial admitted that he had gotten the money by street betting. Held for plaintiff, the court saying that the money was plaintiff's money, even though it had been unlawfully obtained. How plaintiff got the money was no part of plaintiff's cause of action against defendant.

business was transacted, then the plaintiff is entitled to recover said money from the defendant; nor, in such case, can the defendant avoid his liability to account for said moneys by showing that by the understanding between the plaintiff and himself, said money was to be employed in illegal transactions in wheat of the nature stated in his answer; and that said money was employed, and said profits realized in such transactions." Which charge the court refused to give, and to such refusal the plaintiff, by his counsel, then and there excepted.

The verdict of the jury was in favor of the defendant, and judgment was rendered accordingly. This judgment on petition in error was reversed by the district court, and this proceeding is to reverse the judgment of the district court.

McIlvaine, J. While it has ever been the policy of the law to leave the parties to an illegal transaction where it finds them by refusing relief to either in respect thereto, it has, on the other hand, never regarded property or money employed therein or produced thereby as common plunder to be seized or retained by others in no way interested in such business.

The question, however, in this case, arising on the refusal of the court of common pleas to charge the jury as requested by the plaintiff is: May an agent who has transacted illegal business for his principal and has received money belonging to his principal and accruing from such business, defend himself, in a court of law, against liability to account therefor, by showing such unlawful business and his connection therewith as such agent?

If the agent receiving such money had not been employed in conducting such business, it would seem to be quite plain, upon principles of purest morality, that he should account to his principal therefor; but where the sole employment of the agent was to manage and conduct the unlawful transactions, it seems to me, a much more difficult question arises. In the latter case the agent is a particeps criminis. In offenses against trade, and the like, the law, regulating the administration of penal justice, does not recognize the relation of principal and agent, unless the agent be an innocent instrument merely. In such cases the guilty offenders against the law are all principals; hence, as between such, with some show of reason it might be said, that the law will afford no redress by civil remedies.

The rulings upon this question, however, have been so uniformly the other way, it becomes our duty to follow them, unless we find them totally repugnant to public policy and morality. Upon a careful examination of the authorities, we find no such repugnancy—indeed they commend themselves to our judgment.

In the first place the rule which denies civil remedies in such cases applies only to the parties to the illegal transaction. Public policy does not require that one engaged in an unlawful enterprise should, by pleading it, shield himself from liability for the wages of his employees, agents or servants. It is enough that the rule should be en-

forced as between those who have some interest in the enterprise as principals.

In the second place, it is contrary to public policy and good morals, to permit employees, agents or servants to seize or retain the property of their principal, although it may be employed in illegal business and under their control. No consideration of public policy can justify a lowering of the standard of moral honesty required of persons in these relations.

And again, if parties to an illegal contract, waive the illegality, and honestly account as between themselves, no other person can be heard to complain of such accounting. Hence, we think, that if in making such settlement one of the guilty parties should deliver property or money to an agent of another to be delivered by the agent to his principal, such agent is bound to account therefor to his principal.

A leading case on this question is Tenant v. Elliott, 1 Bos. & Pul. 2, where the defendant, a broker, affected an illegal insurance for the plaintiff on a ship, and after a loss the underwriters paid the amount of the insurance to the defendant, who refused to pay the same over to plaintiff, on the ground that the insurance contract was illegal. Judgment for the plaintiff. Eyre, C. J., said: "The defendant is not like a stakeholder. Whether he who has received money to another's use on an illegal contract, can be allowed to retain it, and that not even at the desire of those who paid it to him? I think he cannot."

In Brooks v. Martin, 2 Wall. 70, 17 L. Ed. 732, it was held by the supreme court of the United States, that "after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners was passed into other forms—the results of the contemplated operation completed, a partner in whose hands the profits are, cannot refuse to account for and divide them on the ground of the illegal character of the original contract."

In Baldwin v. Potter, 46 Vt. 402, it was held that "an agent is bound to account to his principal for money received in the course of his agency, for goods sold by his principal on orders obtained by him as such agent on commission, although such sales as between the principal and purchaser be illegal and void."

In Evans v. Trenton, 4 Zab. (24 N. J. Law) 764, it was held: "The mere agent of a party to an illegal transaction cannot set up the illegality of the transaction in a suit by his principal to recover money that has been paid to such agent for his principal on account of the illegal transaction. This defense can be set up only by a party to the illegal transaction." In this case the illegal transaction was accomplished through the agent.

See, also, Wood on Master and Servant, section 202, where it is said: "While the courts will not enforce an illegal contract, yet, if a servant or agent of another has, in the prosecution of an illegal enterprise for his master, received money or other property belonging to the master, he is bound to turn it over to him, and cannot shield himself from lia-

bility therefor upon the ground of the illegality of the original transaction."

The doctrine of these authorities, and many others which might be cited is recognized, applied and enforced in German, &c., Church v. Stegner, 21 Ohio St. 488, wherein it is held: "While a promissory note given to and discounted by a corporation for a loan of money in the course of an unauthorized banking business will not be enforced, yet where the treasurer of such corporation has taken and appropriated to his private use moneys deposited with it contrary to the statute against unauthorized banking, and being unable when called on to refund the same, secures it by his promissory note, such note will not be held to have been given in the course and furtherance of an illegitimate business, and an action will lie thereon."

Judgment of district court affirmed.[51]

[51] In Baldwin v. Potter (1874) 46 Vt. 402, plaintiffs employed defendant to solicit orders for and sell an article called "prize candy" on commission. It was part of defendant's duty to make collections for candy sold by him and to pay the amounts collected to plaintiffs on demand. Defendant resisted plaintiffs' action of general assumpsit to recover the amount of collections made by defendant on the ground that the scheme under which the prize candy was sold constituted a violation of the statute prohibiting the setting up of a lottery. The court held for plaintiff; Pierpoint, C. J., saying: "We do not find it necessary in this case to consider the question as to whether the contract for the sale of the property referred to, by the plaintiffs, to the several persons who purchased it, were contracts made in violation of law, and therefore void, or not. This action is not between the parties to those contracts; neither is it founded upon, or brought to enforce, them. If those contracts were illegal, the law will not aid either party in respect to them; it will not allow the seller to sue for and recover the price of the property sold, if it has not been paid; if it has been paid, the purchaser cannot sue for and recover it back. The facts in this case show that the purchasers paid the money to the plaintiffs, not to the plaintiffs personally, but to the defendant as the agent of the plaintiffs, authorized to receive it. When the money was so paid, it became the plaintiff's money, and when it was received by the defendant as such agent, the law, in consideration thereof, implies a promise on the part of the defendant, to pay it over to his principals, the plaintiffs; it is this obligation that the present action is brought to enforce; no illegality attaches to this contract. But the defendant insists that, inasmuch as the plaintiff could not have enforced the contracts of sale as between himself and the purchaser, therefore, as the purchaser has performed the contracts by paying the money to the plaintiffs through me, as their agent, I can now set up the illegality of the contract of sale to defeat an action brought to enforce a contract on my part to pay the money that I as agent receive, over to my principal. In other words, because my principal did not receive the money on a legal contract, I am at liberty to steal the money, appropriate it to my own use, and set my principal at defiance. We think the law is well settled otherwise, and the fact that the defendant acted as the agent of the plaintiffs in obtaining orders for the goods, does not vary the case. Tenant v. Elliott, 1 B. & P. 3; Armstrong v. Toler, 11 Wheat. 258, 6 L. Ed. 468; Evans v. City of Trenton, 4 Zab. (24 N. J. Law) 764."

In Lemon v. Grosskopf (1868) 22 Wis. 447, 99 Am. Dec. 58, plaintiff, the proprietor of an illegal lottery scheme, employed defendant to sell tickets for the lottery. Defendant having sold 258 tickets at a dollar a piece and having received for transmission to plaintiff from one Kilgore (another agent of plaintiff) the sum of $255 received by Kilgore on the sale of lottery tickets, gave plaintiff his note for the total amount. To an action on this note defendant interposed the defense of illegality. The court, per Cole, J., said: "The defendant was employed by the plaintiff to sell these lottery tickets,

receive and retain the money for them until he became satisfied that the drawing of the prizes in the scheme was fairly conducted, and then account to the plaintiff. It was as well a part of his agency to receive and account for the money as to sell the tickets. And an action to recover this money goes in affirmance of the illegal contract and to enforce the performance of this duty. The main object of the agency was to do an act criminal by our statute (Rev. St. 1858, § 2, c. 169),—to engage 'in a traffic not merely forbidden but fraudulent and indictable.' And if the agent is dishonest in the transaction of the business,—if he refuses to account for money which he has secured for the tickets sold by him,—should the court interfere and enforce a performance of his duty? It seems to us that the court must decline to interfere on either side upon the maxim, 'Ex turpi causa non oritur actio.' * * * But the money which the defendant received from Kilgore stands upon different grounds. So far as that money was concerned, it seems to us that it stands precisely on the same ground it would had Kilgore delivered the money to some stranger, or to an express company, to transmit it to the plaintiff. It is disconnected with the illegal transaction, and is not affected by it. It is the case suggested by the Master of the Rolls in Thomson v. Thomson, 7 Ves. 468, 471, of money paid into the hands of a third person for the use of the plaintiff, who may recover the same from such third person, although the money is the proceeds of some illegal transaction. Merritt v. Millard, 5 Bosw. (N. Y.) 645. Therefore, so far as respects the $255 paid the defendant by Kilgore for the plaintiff, the action is maintainable."

See, also, Ruemmeli v. Cravens (1903) 13 Okl. 342, 74 Pac. 908.

Partnership for Illegal Purpose.—By the better doctrine, one partner cannot recover from a copartner the fruits of an illegal partnership. The Highwayman's Case (1725) 9 Law Quart. Rev. 197; McMullen v. Hoffman (1899) 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117 (a bill in equity—virtually overruling Brooks v. Martin [1863] 2 Wall. 70, 17 L. Ed. 732); Central Trust & Safe Deposit Co. v. Sharp (1902) 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479, 99 Am. St. Rep. 317. Contra: McDonald v. Lund (1896) 13 Wash. 412, 43 Pac. 348.

In McMullen v. Hoffman, supra, Peckham, J., distinguishing Tenant v. Elliott, 1 Bos. & Pul. 2 (page 306, supra), and Farmer v. Russell, 1 Bos. & Pul. 295, said: "The difference in the principle upon which a recovery was allowed in these two cases and that upon which the defense in this case is based is very clear. In the case before us the cause of action grows directly out of the illegal contract, and if the court distributes the profits it enforces the contract which is illegal. But where A. claims money from B., although due upon an illegal contract, and B. acknowledges the obligation and waives the defense of illegality and pays the money to a third party upon his promise to pay it to A., the third party cannot successfully defend an action brought by A. to recover the money by alleging that the original contract between A. and B. was illegal. This is the principle decided, and we think correctly decided, in the cases cited."

Sunday Contracts.—For a brief discussion of quasi contractual obligations in connection with contracts made or to be performed on Sunday in jurisdictions where such contracts are prohibited by law, see Woodward, Quasi Contracts, § 153. See, also, 15 Columbia Law Review, 619.

Champertous Contracts.—As to the right of an attorney to recover the value of services rendered his client under a champertous contract, see note in Ann. Cas. 1913B, 1091.

SECTION 3.—CONTRACT UNENFORCEABLE BECAUSE OF STATUTE OF FRAUDS

I. Defendant Repudiates [52]

RICHARDS v. ALLEN.

(Supreme Judicial Court of Maine, 1840. 17 Me. 296.)

Exceptions from the Court of Common Pleas; Redington, J., presiding.

Assumpsit for a quantity of bricks delivered in 1829, and a yoke of oxen delivered January 27, 1832. The writ was dated January 27, 1838. Eighteen or twenty years before the commencement of the suit, the plaintiff contracted verbally with the defendant for the purchase of a farm, and entered upon the farm under that verbal contract, and lived thereon until the time of trial. The bricks and the oxen were delivered at the respective times charged in part payment of the farm, under the verbal contract for the purchase thereof. The plaintiff proved that the defendant, in the spring of the years 1837 and 1838, told the plaintiff that he supposed the plaintiff had paid for about one half the farm by way of the oxen and bricks; that he was ready to give a deed of the farm; and that he would see Stubbs and Dickey, and come in a few days to the plaintiff's house, and give the plaintiff or his son a deed. The defendant conveyed the same to one Stubbs by deed dated January 18, 1838. The defendant, for the purpose of

[52] "The statute provides that no action shall be sustained upon certain contracts, unless they are evidenced by writing. It operates therefore upon the contract, only while it is executory. It does not make the performance of such a contract unlawful, but if the parties choose to perform it, the contract remains in full force, notwithstanding the statute, so far as relates to the legal effect and consequences of what has been done under it. Hence a party may always defend under such a contract when sued for any act done under it. Thus, suppose a crop of grass is sold by parole, and the vendee enters upon the land and cuts it. If an action of trespass should be brought against him, by the vendor, upon the ground that the contract was void, still, although the contract is within the statute, it would furnish a sufficient defense, because it is executed." Philbrook v. Belknap (1834) 6 Vt. 383, 386.

"But it is contended that there can be no action maintained upon an implied promise, where the subject-matter is embraced in a special contract. The authorities before referred to, all shew that this general principle applies to cases where the special contract is valid, and the plaintiff might, if he had framed a special count properly, have recovered upon it. But where the plaintiff brings his action upon an implied promise and the defendant would avoid it by proving a special agreement, he must show such an one as would be valid in law. He cannot avoid the special agreement by bringing it within the statute of frauds, and still make use of that agreement to defeat his implied promise." Holbrook v. Armstrong (1833) 10 Me. 31, 41. See to the same effect Booker v. Wolf (1902) 195 Ill. 365, 370, 63 N. E. 265.

showing that the plaintiff had abandoned the contract for the purchase of the land, proved that the plaintiff said to one Dickey, in September, 1837, that he had no interest in the land, and that Allen might convey it to whomsoever he pleased. The defendant offered to prove that shortly afterwards Dickey told Allen what the plaintiff had said. This was ruled by the Judge to be inadmissible, as it did not appear that the plaintiff wished the statement to be made to the defendant. It did not appear, that the defendant gave the plaintiff any information of his intention to sell the land to Stubbs, or that the plaintiff tendered money, or demanded a deed. The defendant filed an account in set-off, for the use and occupation of the farm, and offered at the trial to prove it. The Judge declined to receive the evidence, and directed the account to be laid out of the case. The jury were instructed, that if they believed the admission and promise made by the defendant to the plaintiff in 1837 and 1838 to convey the land, it would enable the plaintiff to recover back what he had paid the defendant therefor, although a part of the payment had been made more than six years before the date of the writ, and notwithstanding the original contract for the sale and purchase of the land was not in writing. The verdict being for the plaintiff, the defendant filed exceptions.

WESTON, C. J. The contract between the parties in regard to the farm, was one, which being by parol, could not be enforced at law. It was however morally binding; and payments made by the plaintiff, on account of the purchase, could not be reclaimed, so long as the defendant was in no fault. But if he, without any justifiable cause, repudiated the contract, and refused to be bound by it, a right of reclamation would accrue to the plaintiff, to the extent required by the principles of justice and equity. The statute of limitations would not begin to run, until the cause of action accrued.

The terms of the contract do not appear in evidence; but in the spring of 1837, the defendant recognized the contract as a subsisting one, acknowledged the payment of half the amount of the purchase, by bricks and a yoke of oxen, and promised in a few days to give the plaintiff or his son a deed of the farm, doubtless upon being paid or secured the remainder of the purchase money. On the 18th of January following, he conveyed the farm to a third person. This was putting an end to the contract, by depriving himself of the power to fulfil it. Was he justified in this course by any act or failure on the part of the plaintiff? Nothing of this kind was offered in proof by the defendant, except the declarations made by the plaintiff to the witness, Dickey. That was a casual conversation, giving no authority to the witness to make any communication to the defendant. The plaintiff cannot thereby necessarily be understood to have waived his rights. He stated, that he had no interest in the land, and that the defendant might convey it to whom he pleased. This was true, if understood, as it may be, of legal interest on the one hand, and of legal power on the other. The testimony of Dickey therefore, if re-

ceived, might not conclusively affect the merits of the cause, or justify the conveyance made by the defendant, without subjecting him to a right of reclamation by the plaintiff.

It may be contended, that this right could not be exerted, until the plaintiff had first tendered to the defendant the remainder of the purchase money and thereupon demanded a deed. This may be true, if the defendant had not, by his own act, deprived himself of the power of fulfilment. This excuses the useless ceremony of tender and demand, which might otherwise have been essential to the maintenance of the action. Newcomb v. Brackett, 16 Mass. 161.[53]

But the plaintiff's claim must be limited to what is just and equitable, under all the circumstances. He had made some payments; but he had enjoyed the farm for eighteen or twenty years. The jury should have been permitted to take this into consideration, even without an account in offset, as it was necessarily connected with the plaintiff's claim, and was of a character to affect and qualify it.[54] This not having been done, we sustain the exceptions, and grant a new trial.[55]

[53] Tender is not necessary in a case where defendant has expressed his intention not to perform the oral contract. Cook v. Doggett (1861) 2 Allen (Mass.) 439.

[54] Accord: Ham v. Goodrich (1858) 37 N. H. 185; Collins v. Thayer (1874) 74 Ill. 138. In the latter case the court said: "It is unjust for appellee to hold this land for years under the contract, such as it was, and then escape from paying for what he has received to his profit and benefit. And unless evicted by paramount title, and [under] a liability to account for the rents to the true owner, he is liable to account to his vendors for its use."

See, also, Day v. New York Central Railroad Co., page 324, infra.

[55] Accord: Cook v. Doggett (1861) 2 Allen (Mass.) 439. ("An action for money had and received lies for recovering back money paid by a party to an agreement which is invalid by the statute of frauds and which the other party refuses to perform.")

EFFECT OF SUCH PART PERFORMANCE AS ENTITLES PLAINTIFF TO ENFORCE CONTRACT IN EQUITY.—Such partial performance of a parol contract for the conveyance of land as will entitle plaintiff to a bill for specific performance does not prevent plaintiff from recovering at law for the value of the services rendered by him under such partial contract. "That one has an adequate remedy at law may be a reason why equity should not hear his prayer; but that he might have claimed relief in equity is no reason why he should not have his usual remedy at law." Reynolds v. Reynolds (1902) 74 Vt. 463, 52 Atl. 1036, per Stafford, J. Smith v. Hatch (1865) 46 N. H. 146.

In Smith v. Rogers (1886) 42 Hun (N. Y.) 110, it was held that money paid under a parol contract to purchase land might be recovered, even though there was sufficient part performance by plaintiff to entitle him to specific performance against a grantee with notice.

See, however, Cilley v. Burkholder (1879) 41 Mich. 749, 3 N. W. 221, and Johnson v. Puget Mill Co. (1902) 28 Wash. 515, 68 Pac. 867 in which cases the court denied a recovery of the purchase money to one who had taken possession of the premises and had done such acts as to entitle him to specific performance in equity, as against a defendant who was willing to complete the parol contract.

Compare with these last cases Collier v. Coates, page 341, infra.

GAY v. MOONEY.

(Supreme Court of New Jersey, 1901. 67 N. J. Law, 27, 50 Atl. 596.)

Error to court of common pleas, Middlesex county.

Action by Michael Gay against Hugh Mooney, administrator of Hugh Mooney, deceased. Judgment for plaintiff, and defendant brings error.

DIXON, J. The defendant's intestate was the uncle of the plaintiff's wife, and for several years before his death resided in the plaintiff's family. In the present suit the plaintiff sought to recover compensation for the board and lodging furnished to the deceased.

In order to rebut a presumption that the service was rendered and received as a gratuity, the plaintiff put in evidence tending to show an understanding between himself and the deceased that the latter would devise a certain dwelling house to the plaintiff's children in return for what he should receive as a member of the family.

For such a purpose this evidence was plainly legitimate. It came within the rule laid down in Disbrow v. Durand, 54 N. J. Law, 343, 24 Atl. 545, 33 Am. St. Rep. 678, that in cases like the present a reasonable and proper expectation that there would be compensation must, and hence may, be shown. The bargain thus exhibited is not one on which an action at law could be maintained, because it related to land, and was not susceptible of such proof as the statute of frauds requires; but when, in pursuance of a bargain for this reason unenforceable, services have been rendered, the legal remedy is by an action on the quantum meruit for the value of the services. McElroy v. Ludlum, 32 N. J. Eq. 828. As was said in Stone v. Todd, 49 N. J. Law, 274, 281, 8 Atl. 300, the intended devise was but the method of paying an admitted obligation, and, if payment in that manner be not made, the creditor is entitled to recover the value of the services.

Although the bargain between the plaintiff and the intestate contemplated payment to be made to the plaintiff's children, and not directly to himself, yet, as that bargain did not take the form of an actionable contract, it falls out of view as a ground of legal remedy, and appears only to give color to the conduct of the parties in furnishing and accepting the service rendered. It affords the means of determining that the service was not a gift, but a sale, and out of that determination the law deduces a right in him who sold the service to be paid its value by him who bought it.

These principles sufficiently answer the important exceptions taken at the trial and all the exceptions mentioned in the brief of counsel. The other exceptions, therefore, need not be noticed.

The judgment of the Middlesex pleas is affirmed.[56]

[56] **Accord: In re Taylor's Estate (1907) 132 Wis. 38, 111 N. W. 229, 122 Am. St. Rep. 943 (contains an excellent discussion).**

SMITH v. WOODING.

(Supreme Court of Alabama, 1852. 20 Ala. 324.)

Error to the Circuit Court of Tallapoosa. Tried before Hon. E. Pickens.

This was an action of assumpsit by Wooding against Smith, for the use and occupation of land. The plaintiff proved "that he sold the defendant a tract of land by a verbal contract, and put him in possession; that defendant was to pay him $500 down, and $500 twelve months after, and was to enter into a written contract with plaintiff respecting the land, to be drawn up by one Pickard, and that defendant failed to pay plaintiff according to the contract. The defendant proved that he, together with Pickard, had made fifty dollars worth of improvements upon the land; also, that whilst he was in possession, and had been for about thirteen months, and after his failure to pay, and his refusal to let Pickard draw the writings, plaintiff sold the land to one Johnson, and brought an action against defendant for unlawful detainer, and recovered; that defendant took the case to the Circuit Court, where the judgment was reversed and the case remanded, when plaintiff dismissed his complaint. Between the sale to Johnson and the dismissal, defendant left the premises. This was the substance of the testimony in the case."

The court charged the jury, that if they found the defendant had either failed or refused to pay plaintiff according to contract, or refused to enter into writings with plaintiff, although the defendant was still in possession when the land was sold to Johnson, plaintiff was entitled to recover.

Verdict for the plaintiff and judgment thereon.

PHELAN, J.[57] * * * The charge of the court lays down the broad proposition, that if defendant had either failed or refused to pay according to contract, or had refused to enter into writings, that plaintiff was entitled to recover.

The defendant took possession of the land under a verbal contract to purchase, and a part of this contract was, that he should pay "$500 down, and $500 twelve months after." The proof shows, that he paid no money; that he remained in possession for more than twelve months, and then abandoned the possession, before the suit was brought. There is no proof that he failed or refused to pay the money because the plaintiff neglected or refused, upon application, to execute to him a deed or other written contract for the purchase and sale of the land, as a condition to his payment of the money. His failure to pay the money, then, was a violation of his contract, from the very day he took possession, as to the first $500, and a further violation, after twelve months, as to the second $500; which made him liable to the

[57] The statement of facts is abridged and portions of the opinion are omitted.

plaintiff at any time for the use and occupation of the land for the time he occupied it. The contract being for the sale of land, and not in writing, bound neither of the parties, under the Statute of Frauds, and it was in the power of either to disregard it altogether. But if the defendant was put in the possession of land under it, and then refused to comply with the contract on his part, without fault on the part of the plaintiff, the latter would be entitled to an action for use and occupation, to recover of the defendant whatever the possession of the land was reasonably worth.

A contrary doctrine was held for a time, under the imposing authority of Lord Mansfield, in the case of Kirtland v. Pounsett, 2 Taunton, 145, upon the construction of the English statute giving the action for use and occupation of land, (11 Geo. 2), of which ours is a copy, (Clay's Dig. 505, § 1,) in which he held, that to authorize that action, the relation of landlord and tenant must exist, and that when a party enters under a contract of purchase, the idea of landlord and tenant is negatived.

The criticism of Mr. Baron Graham, in the Court of Exchequer, in Hull v. Vaughan, 6 Price, 157, upon that case, indicates the course of decision now generally adopted, in respect to the action for use and occupation. He says: "It is not necessary, in this species of action, that the proper relation of landlord and tenant should be distinctly made out between the parties, because the action is calculated in form to meet cases where the parties do not bear these characters, if there be in point of fact an ownership on one hand and an occupation on the other; and it should be liberally applied where it may be found to be a party's only remedy." See, on this subject, Davidson v. Ernest, 7 Ala. 817, and authorities there cited. * * *

There is no error in the record, and the judgment is affirmed.[58]

[58] Accord: Gould v. Thompson (1842) 4 Metc. (Mass.) 224, in which case Shaw, C. J., characterized Hull v. Vaughan (1818) 6 Price, 157 (cited in the principal case) as holding that "where the relation of landlord and tenant subsisted by any contract, express or implied by law, the action for assumpsit for use and occupation would lie, and that such contract would be implied from the actual occupation and enjoyment of the premises, by permission of the owner, or other person having the power of disposal, when such use and occupation had been beneficial."

Contra: Smith v. Stewart (1810) 6 Johns. (N. Y.) 46, 5 Am. Dec. 186; Bell v. Ellis' Heirs (1832) 1 Stew. & P. (Ala.) 294. (Here, however, plaintiff was the one to repudiate the oral contract.)

RAY v. YOUNG.

(Supreme Court of Texas, 1855. 13 Tex. 550.)

Error from Goliad. This suit was brought to recover compensation for damages incurred by the plaintiff in work and labor done and performed by him in the execution of a verbal contract with the defendant's intestate. The contract is alleged to have been made about the 1st of June, 1852; that it was agreed between defendant's intestate and plaintiff that plaintiff should keep the stock of cattle of the said intestate, for the term of five years, for one-fourth of the increase, to be appropriated and branded as plaintiff's share at suitable times for branding, generally from season to season; that plaintiff should prepare a family residence and suitable pens near the Escondido, at a place agreed upon between the parties, as soon as convenient; and when thus prepared, about the 1st of September, 1852, plaintiff should have the entire control of said stock and the said term of five years should commence; that plaintiff commenced the work of preparation and had nearly completed it when the defendant's intestate died; and that the work was completed before the 1st day of September, 1852. Plaintiff alleged the breach of this verbal contract, and its abandonment, and brought this suit to recover damages, by way of compensation, for the injury he had sustained in work and labor in preparing to keep the stock of the defendant's intestate; the presentation of the claim to the administrator and its rejection were averred. To this petition the defendant demurred, and the court below sustained the demurrer, from which an appeal was taken.

LIPSCOMB, J. There can be no doubt but what the court sustained the demurrer on the ground that, as the contract was not to be completed before the end of five years, and it not being in writing, it was void under the statute of frauds providing that no action shall be brought "upon any agreement which is not to be performed within the space of one year from the making thereof, unless the promise or agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing, signed by the party to be charged therewith." (Hart. Dig. art. 1451.) If the suit had been founded upon the verbal contract set out in the petition, and for its specific performance, or damages for its breach, there can be no doubt but the demurrer would have been well taken, and correctly sustained by the court. But the suit is not so brought. This contract is only set out by way of inducement, and not as the foundation of the action. It is contended that, induced by the contract, the petitioner had been at the expense of building a residence and erecting pens, preparatory to taking charge of the stock of the intestate; that for such labor induced by the contract the defendant's testator would have been liable, whilst living, unless he had given notice that he would not comply with the contract; and his estate is now liable. It would be iniquitous to rule

that the plaintiff had no redress for injury and loss that the defendant's intestate had induced him to incur. If the provision of the statute of frauds cited is to have this effect instead of its preventing fraud it will be making it the instrument and means of perpetrating fraud.

We believe that the plaintiff is entitled to compensation for his labor so bestowed before the death of the defendant's testator, and not after. The cases cited by the counsel for the appellee are all of them cases in which a part performance was sought to be made the grounds of enforcing the contract, and they have no bearing upon this case, where the contract is not set up as the foundation of the suit. The judgment is reversed and the cause remanded to the court below. Reversed and remanded.[59]

MONTAGUE v. GARNETT.

(Court of Appeals of Kentucky, 1867. 3 Bush, 297.)

WILLIAMS, J. Garnett leased Montague his farm for three years from January 1, 1861, until January 1, 1864, and, at the same time, verbally loaned him one hundred barrels of corn and three thousand three hundred and sixty pounds of pork, to be returned at the expiration of the lease. The corn and pork not being returned, Garnett sued and recovered judgment for their value, from which Montague appealed.

It is insisted that this was a verbal contract, not to be performed within a year, and, therefore, no recovery can be had because of the statute against frauds and perjuries.

There is evidently a distinction between contracts executed in part or whole, and one wholly to be executed by both parties, under said statute, as was said by this court in Roberts v. Tennell, 3 T. B. Mon. 247; and, as therein said, the statute does not declare such contracts void, but only that suit for their enforcement cannot be maintained.

Where a contract is wholly executory on both sides, as neither could bring a suit for its enforcement, the legal effect would be the same as though the contract had been declared void; but this is not the effect of the statute where there has been an execution of the contract, in part or whole, by one party; for, in such cases, the law implies a contract to pay for the consideration received; and neither the letter nor spirit of the statute prohibits a suit to recover on this implied obligation of the law.

[59] Accord, on similar facts: Wonsettler v. Lee (1888) 40 Kan. 367, 19 Pac. 862; Crenshaw v. Bishop (1911 Tex. Civ. App.) 143 S. W. 284. In the latter case the court said: "The dealings between the parties must be viewed from the same standpoint as though the contract alleged had never been effected. In the absence of such a contract, the defendant was entitled to recover the reasonable value of the feed and pasturage furnished the stock at the plaintiff's instance, and this was the measure of damages submitted in the court's charge."

If a party borrows money, to be returned in two years, whilst no suit could be brought to enforce such mere verbal promise, yet a suit to enforce the implied promise, created by law, to return the money on the valuable consideration, could be maintained. Nor would the contract be without effect in such case, for the defendant could use it to protect himself against suit until the expiration of the time, simply because the statute has not declared the contract void. He could also use it for the purpose of reducing the interest below the legal rate, if such had been agreed; but he could not use it to prevent a recovery of the valuable consideration which he had derived by virtue of its terms, because the statute was never designed for such purposes. It was never designed to enable one man to get the property of another, by virtue of a parol contract, and then refuse to either execute the contract or return the property. Even in parol contracts for land, when possession has been delivered, courts adjust the rents and improvements on equitable principles, whilst they refuse to compel a specific execution of the contract.

When the law does not imply a promise to return the consideration, as for money loaned to be bet at cards, &c., but declares the contract void, no suit could be maintained, when the pleadings show the promise to return is verbal and not to be executed within a year, because the express promise would conflict with the statute against frauds and perjuries, and there would be no implied promise by law to sustain the suit. But when the consideration, so far from being illegal and vicious, is valuable and virtuous, neither the statute nor public policy forbid a recovery upon the implied promise, in law, to return or pay for it.

The instructions of the court, and verdict of the jury and judgment thereon, being in accordance with these views, the judgment is affirmed with damages.[60]

[60] Accord: Bethel v. Booth & Co. (1903) 115 Ky. 145, 72 S. W. 803, 24 Ky. Law Rep. 2024. (Sale by plaintiff to defendant of plaintiff's business in consideration of defendant's oral promise to employ plaintiff for ten years.)

MEASURE OF DAMAGES.—In Faircloth v. Kenlaw (1914) 165 N. C. 228, 81 S. E. 299, defendant employed plaintiff as his agent to negotiate for the sale of defendant's land and orally agreed to deed to plaintiff a certain number of acres as compensation. Plaintiff having earned such compensation, defendant refused to go on with the contract, relying on the statute of frauds. Plaintiff sued to recover the value of his services. As to the measure of damages, the court said: "If plaintiff were permitted to recover the value of the land, without regard to the value of his services, we would be practically allowing a recovery for breach of a contract void under the statute, and this would not do, for the latter applies to an action for a breach as well as to an action for an enforcement of the contract. We take this to be the true and sensible rule, that in a suit for work and labor performed, under a contract void by the statute of frauds, evidence of the terms of the contract with reference to plaintiff's compensation is admissible to show the value of his services, as agreed upon by the parties, but is only evidence, and not controlling as matter of law. It is for the jury to consider in making their estimate, and they may award such sum as they may find, upon all the evidence, including that drawn from the contract, is a reasonable value of the services (Moore v. Capewell Horse-Nail Co., 76 Mich. 606, 43 N. W. 644; Schanzenbach v. Brough, 58 Ill. App. 526); the inquiry at last being, What are the services really

HAWLEY v. MOODY.

(Supreme Court of Vermont, 1852. 24 Vt. 603.)

This was an action of assumpsit. Plea, the general issue, and trial by the court.

On trial, the plaintiff gave evidence tending to prove, that on the 11th day of July, 1851, he contracted with the defendant, for a lease of the defendant's tavern stand in Waterbury, (called the Waterbury House,) for one year from and after the first day of September, 1851, for six hundred dollars; and paid the defendant at the time one hundred dollars in a gold watch, which defendant received as a payment of one hundred dollars towards the rent. And it was further stipulated at the time, that the parties should meet at Mr. Dillingham's office as soon as he returned home, (he being absent that day,) and execute a written lease. The contract was all in parol. The plaintiff called upon the defendant for the lease, and the defendant soon after, on the same day, tendered the watch back to the plaintiff, which the plaintiff refused to receive, and the watch was afterwards attached by one of the plaintiff's creditors, and sold on execution against the plaintiff. The defendant, on the 14th day of July, 1851, leased the same premises to one Howard for one year, and declined to lease them to the plaintiff. The plaintiff tendered to the defendant, on the first day of September, 1851, five hundred dollars in specie, and demanded a lease of the premises, according to the contract, which defendant declined. The county

worth? And the contract price is some evidence upon that question, it being in the nature of an admission or declaration of the parties as to the value, and having no more effect as evidence. It is certainly not conclusive upon the jury. Browne on the Statute of Frauds (5th Ed.) § 126."

See, also, Bassett v. Bassett (1867) 55 Me. 127. (Oral contract to exchange land; held, that the value of the property which defendant agreed to convey is admissible as a practical admission as to the value of the property conveyed by plaintiff.) Riiff v. Riibe (1903) 68 Neb. 543, 94 N. W. 517, 4 Ann. Cas. 462. Thacher v. New York, W. & B. Ry. (1912) 153 App. Div. 186, 138 N. Y. Supp. 463; Waters v. Cline (1905) 121 Ky. 611, 85 S. W. 209, 750, 123 Am. St. Rep. 215. Contra: Fuller v. Reed (1869) 38 Cal. 99. ("To permit such testimony for the purpose of establishing the reasonable value of services rendered by plaintiff, or the measure of indebtedness of defendant upon his implied promise to refund money advanced by plaintiff, would, in effect, allow a party in one breath to disaffirm a contract, and in the next to affirm and claim the benefit of the same contract as valid and subsisting, and substantially enable him to recover as for breach of a valid express contract in a simple action of assumpsit upon an implied contract.")

Compare Galvin v. Prentice (1871) 45 N. Y. 162, 6 Am. Rep. 58.

It is sometimes said that plaintiff's recovery on the common counts should never be in excess of the contract rate. King v. Brown (1842) 2 Hill (N. Y.) 485. But see Cozad v. Elam (1905) 115 Mo. App. 136, 91 S. W. 434.

Some few jurisdictions seem to allow a recovery on the contract for services actually rendered in which event the contract rate is, of course, controlling. Fuller v. Rice (1884) 52 Mich. 435, 18 N. W. 204; Spinney v. Hill (1900) 81 Minn. 316, 84 N. W. 116 (court concedes that this doctrine is based on unsatisfactory reasoning). See also, Sears v. Ohler (1911) 144 Ky. 473, 139 S. W. 759.

court, March term, in Washington county, 1852, Poland, J., presiding, adjudged that plaintiff could not recover, and rendered judgment for defendant. Exceptions by plaintiff.

REDFIELD, J. 1. The statute of frauds in this State, contains no exception of leases, or contracts for leases in futuro, as is found in the English statute, and in some of the other States. This case falls, therefore, within the statute.

2. Part performance has not been regarded as any ground of relief at law; and it has not been considered that part payment merely amounted to such part performance, as to entitle the party to enforce the contract in equity even, or not generally.

3. The only question then is in regard to the part payment. It seems to be well settled, that the party repudiating the contract cannot recover for part payment under it ever, but that the other party may. Shaw v. Shaw, 6 Vt. 69.

To this extent, the counsel seem to understand the law alike, and that would settle the rights of the parties sufficiently, were it not that they seem to stand upon ceremony as to the mode, whether the party making the payment in a specific thing, is bound to take back the same thing, when the contract is repudiated by the other party.

There can be no doubt the property passed by the sale and delivery to the defendant, the only question is as to the effect of defendant's refusal to fulfil the contract. If the contract could be regarded as originally void, like a Sunday contract, then no property would pass, until a reaffirmance on some other day.

But here the contract is not void, as was expressly held by this court in Philbrook v. Belknap, 6 Vt. 383.

It has always been so held, whenever the question has arisen, notwithstanding the elementary writers, in a loose way, often speak of this class of contracts as void, meaning thereby contracts upon which no action will lie. That is all the statute provides, "That no suit in law or equity shall be maintained upon them." But to all intents they are contracts, and perfectly valid for all purposes except actions, so long as they are acted under. There can be no doubt the property in this watch passed to defendant, and might have been sold by him, or legally attached upon his debts.

4. The only remaining inquiry then, is as to the effect upon the title of the watch, of defendant's refusal to complete the contract. If this were to be regarded like the case where one is induced to purchase property, by fraudulent representations, and where, upon the discovery of such facts, he elects to rescind the contract, as he may, then the property would revest. But here is no fraud in the contract, neither is it the object of the statute to attach to this class of contracts any mark of reproach.

The contract is innocent enough, if each party chooses to trust to the honor of the other party as to its performance. If that were not

so, one could not recover for payments made under it. The contract is not void, or affected with any taint or turpitude, nor is it rescindable at the election of either party.

Either party, if he choose, may repudiate it, but that only operates upon so much of the contract as remains executory at the time, and does not repeal any thing done under it. For these purposes it remains in full force. And the party repudiating must be content to lose what he has done under it, as the contract remaining in force, the other party may defend under it.

But if the party repudiating the future performance has himself received advances which he declines to pay for in the mode stipulated, it is regarded as equitable that he should refund in the usual mode for money had and for goods sold, and it is not in his power without the consent of the other party, to revest the title of the specific things received.

This seems to us the only view consistent with general principles applicable to the subject, or with the decided cases, and manifestly just and equitable. If the party has bought goods which he declines to pay for in the mode stipulated, and which, but for his own act he might do, he ought and he must be content to pay in the usual mode of paying for goods sold and delivered, and this recovery may be had under the general counts. Gray v. Hill, R. & M. 420; Chit. on Con. 305.

As the former cases upon this subject have adopted no principle at all analogous to allowing either party the power of rescission of the contract, we feel reluctant to push ourselves upon an unexplored field, without some obvious and pressing necessity, in order to warp justice, which we think is not this case.

By the adoption of this new feature, even if it were more consonant with justice in the particular case, which we think it clearly is not, we should be fearful of ultimately encountering evils which are not apparent, at the moment. And there are some which we could easily foresee might arise. The specific things received in payment, might have been more or less put to use by the party receiving them, for which he ought to be accountable.

They might have been sold and transferred in different modes, and thus new rights and interests intervene. And if we adopt the principle of recision, we do not see, but in principle it will cut off by the roots, all rights accrued under the contract before repudiation, which would certainly be unjust to the innocent party.

And as the repudiating party is always clearly in the wrong, it can be no hardship upon him, to pay in currency for what he has received in advance upon the contract.

If one party has the power of recision, then the other, and especially the innocent party, should have the power. The result of which must be, that however many times the property has changed hands, or under whatever circumstances the innocent party may pursue it and

recover of the last proprietor, if not of each intervening one, which would often be attended with serious embarrassment and probable wrong.

Judgment reversed and case remanded for new trial.[61]

DAY v. NEW YORK CENTRAL R. CO.

(Commission of Appeals of New York, 1873. 51 N. Y. 583.)

The complaint alleged in substance that in May, 1855, the plaintiff agreed to convey to the defendant about an acre and two thirds of land, and to build thereon and keep in repair cattle yards and pens for live stock sufficient to accommodate temporarily the keeping and feeding of all cattle, swine and live stock which should be transported on the defendant's road and in consideration thereof that the defendant agreed to deliver to the plaintiff from that time forward, for temporary feeding and keeping, such stock as should be transported on its road eastward from the Niagara river, the profits of such keeping and feeding to be realized by the plaintiff; that pursuant to this agreement (which was not in writing) the plaintiff conveyed the land in question to defendant and constructed the necessary cattle yards, pens and other conveniences for doing business contemplated by the agreement; that the defendant performed for a year, and then disregarded the agreement and refused to allow the live stock transported on its road to be delivered temporarily to the plaintiff for feeding and keeping and refused to allow the plaintiff the enjoyment of the profits he would have realized by keeping and feeding such stock. The answer was a general denial. After a verdict for plaintiff and a reversal by the General Term on the ground that the agreement was void by the Statute of Frauds, the plaintiff amended his complaint by adding a

[61] Accord: Booker v. Wolf (1902) 195 Ill. 365, 63 N. E. 265.

Contra: Duncan v. Baird & Co. (1839) 8 Dana (38 Ky.) 102.

Differing views as to the soundness of this doctrine are found in Keener, Quasi Contracts, 285 to 288, and Woodward, Quasi Contracts, § 96.

NECESSITY OF RESTITUTION OF PROPERTY RECEIVED BY PLAINTIFF.—In Todd v. Bettingen (1910) 109 Minn. 493, 124 N. W. 443, the plaintiff, pursuant to an oral agreement, delivered to the defendant shares of stock of the value of $31,500. The defendant delivered to the plaintiff shares of stock in another company of the value of $11,000, but failed and refused to convey to the plaintiff a tract of land he had agreed to transfer to the plaintiff. The contract was void under the statute of frauds. The plaintiff prayed for judgment for $20,500. The court, holding that the complaint was defective in that it did not allege a tender of the shares back to the defendant, said: "The plaintiff must accordingly allege return or tender or set forth a set of facts which would excuse its absence. Any other view would involve a practical repeal of the part of the statute of frauds applicable. A plaintiff presumptively able to make a restitution could otherwise retain what defendant had delivered to him and sue for value of what defendant had failed to deliver him. This would amount to the enforcement of the contract as valid notwithstanding the statute. The law does not permit the injured man to thus indirectly enforce a contract which he could not enforce directly."

second cause of action in assumpsit for land sold and conveyed, work and labor, and for materials furnished, etc. The plaintiff again went to trial and recovered as damages the value of the land conveyed to the defendant with interest. The defendant appealed.

EARL, C.[62] The point was not taken by the defendant at any stage of the trial, that the plaintiff had not given sufficient proof tending to establish the parol agreement claimed by him, to-wit: That in consideration of the conveyance of the land to the defendant, it was to give to the plaintiff at his yards and pens the business of temporarily keeping and feeding all the stock which should be transported upon its road eastward from Niagara river. Hence we must assume, for the purposes of the appeal, that the parol agreement, as testified to by the plaintiff, was established. We must also assume that this agreement was void under the statute of frauds, for such is the claim on the part of the defendant, and it was upon this theory alone that the recovery was based, and upon it alone the plaintiff seeks to uphold the judgment. As the consideration for the plaintiff's land, the defendant agreed to pay him $1 and to give him the stock business at his yards. It paid him the $1 and gave him all the business for the year 1855 and part of it for the year 1856, and out of this business the plaintiff made profits to the amount of about $6,000. And yet he brings this action to recover the entire value of the land conveyed by him on the ground of a total failure of the consideration of his conveyance. A mere statement of the case shows that the action must be without foundation.

If one pays money, or renders service, or delivers property upon an agreement condemned by the statute of frauds, he may recover the money paid in an action for money had and received, and he may recover the value of his services and of his property upon an implied assumpsit to pay, provided he can show that he has been ready and willing to perform the agreement, and the other party has repudiated or refused to perform it. Gillet v. Maynard, 5 Johns. 85, 4 Am. Dec. 329; King v. Brown, 2 Hill, 485; Cook v. Doggett, 2 Allen (Mass.) 439; Erben v. Lorillard, 19 N. Y. 299; Richards v. Allen, 17 Me. 296.

While the law in such case will not sustain an action based upon the agreement, it still recognizes its existence and treats it as morally binding, and for that reason will not give relief against a party not in default, nor in favor of a party who is in default in his performance of the agreement.

A party who has received any thing under such an agreement, and then has refused to perform it, ought in justice to pay for what he has received, and hence the law for the purpose of doing justice to the other party will imply an assumpsit.

An assumpsit is never implied except where the justice and equity of the case demand it. A party entering into an agreement, invalid under the statute of frauds, is charged with knowledge that he cannot

[62] The statement of facts is abridged.

enforce his agreement, and if he, not being in default, has received part of the consideration of his agreement, upon what principle of justice or equity will the law imply an assumpsit on the part of the party in default still to pay the entire consideration? Yet such an assumpsit has been enforced in this case.

Suppose one agree by parol to work for another for ten years for the consideration of $500, to be paid at the end of that time, and also a piece of land to be conveyed to him, and at the end of the time, the $500 be paid and the conveyance of the land refused, can he, upon an implied assumpsit, recover the entire value of his services? If he has received no part of the consideration agreed to be paid to him, the law will imply a promise to pay him what his services are worth, and will enforce such promise. But what shall be done when he has received part of the consideration? He should not be left without any remedy for the balance honestly due him, but upon the same principles of justice and equity the law should imply a promise to pay the balance.

Here the plaintiff was to receive for his land $1 and the stock business at his yards. The $1 may be regarded as merely nominal, and the other must be held to be the substantial consideration. The plaintiff expected to get the value of his land in the profits which he should make out of the business which the defendant should give him. This business the defendant gave to the plaintiff for one year, at least, just as it agreed to, and out of it the plaintiff appears to have made profits much greater than the value of the land conveyed. These profits were the very consideration contemplated by the parties for the conveyance of the land, and to the extent that the plaintiff has had the business and profits, he has had the very consideration he contracted for. Suppose the defendant had agreed to pay plaintiff $100 and also to give him the stock business, could the plaintiff in this action after receiving the $100 recover the whole value of the land, entirely ignoring the money payment? Suppose, instead of giving the defendant land, the plaintiff had paid it money for the same consideration, could he under the circumstances of this case, recover back all the money paid in an action for money had and received? Clearly not. The very basis upon which the action rests forbids it. As said by Lord Mansfield in Moses v. McFerlan, 2 Burr. 1005, "if the defendant be under an obligation from the ties of natural justice to refund, the law implies a debt and gives this action founded in the equity of the plaintiff's case." And he says the action "is equally beneficial to the defendant. It is the most favorable way in which he can be sued; he can be liable no further than the money he has received; and against that may go into every equitable defense upon the general issue; he may claim every equitable allowance; he may prove a release without pleading it; in short, he may defend himself by every thing which shows that the plaintiff, ex æquo et bono, is not entitled to the whole of his demand or to any part of it." And in Longchamp v. Kinny, 1 Douglas, 137, the same learned judge says: "Great benefit arises from a liberal exten-

sion of the action for money had and received, because the charge and defense in this kind of action are both governed by the true equity and conscience of the case."

It would be against both equity and good conscience to allow the plaintiff in the case supposed to recover all the consideration which he had paid when he had already received a part of the benefit and consideration which he had contracted for. Within the principles laid down in the cases cited he would be permitted to recover the balance only of the money paid by him after deducting the value of so much of the consideration as he had received, and if it could be shown in such case by the defendant that plaintiff had actually received from the defendant upon the agreement more than he had paid there would be no basis of law or equity for the action to stand on. The same principles of justice and equity should be applied to this case. The plaintiff's equities can be no greater that he paid in land rather than in money. The agreement cannot be enforced. Neither party can in this action be allowed any benefit from it or any damage for its breach. The defendant having repudiated the agreement the plaintiff can recover for his land as if there had been no agreement as to the amount of the consideration, but he must allow so much of the consideration as has been paid; and if he has received more in the profits of the business which the defendant brought to him under the agreement than the value of his land, he can recover nothing. If the profits are less than the value of the land, then he can recover the balance.

It was not necessary for the plaintiff to tender the profits to the defendant before the commencement of the action. They were part of the consideration received by him for his conveyance, and he has the same right to hold them as if so much money had been paid to him by the defendant. His claim is against the defendant for the balance, if any, of the value of the land. These views are fully supported by well-recognized principles of law. I find no authority in conflict with them, and the case of Richards v. Allen, 17 Me. 296, is the only authority which has come to my notice directly in point. In that case there was a verbal contract between the plaintiff and defendant for the purchase and sale of a farm, and the plaintiff had delivered to the defendant upon the contract a quantity of brick and a yoke of oxen. After the plaintiff had been in possession of the farm for about twenty years the defendant conveyed it to another person, and refused to convey to the plaintiff. He then sued the defendant in assumpsit for the value of the brick and oxen, and it was held that he could recover, but that he must allow for the use of the land. The court says: "But the plaintiff's claim must be limited to what is just and equitable under all the circumstances. He had made some payments, but he had enjoyed the farm for eighteen or twenty years. The jury should have been permitted to take this into consideration even without an account in offset, as it was necessarily connected with the plaintiff's claim, and was of a character to affect and qualify it."

My conclusion therefore is that the judgment should be reversed and a new trial granted, costs to abide event. All concur except JOHNSON, C., not sitting.

Judgment reversed.

DOWLING v. McKENNEY.

(Supreme Judicial Court of Massachusetts, 1878. 124 Mass. 478.)

Contract. The declaration contained three counts. The first was to recover $200, on an account annexed, for "furnishing materials for, and labor and work in making, a monument." The second was as follows: "And the plaintiff says that he made an agreement with the defendant to furnish materials and construct for her a monument for the sum of two hundred dollars; that he furnished materials and made said monument for the defendant, and tendered the same to the defendant; and that she owes him therefor the sum of two hundred dollars." The third was on an account annexed, and contained the following items: "To ten days' labor on monument, $50. To three days' services in preparing land and foundation for same, $15." Answer, a general denial.

At the trial in the Superior Court, before Dewey, J., the plaintiff testified that he was a manufacturer of monuments and gravestones, keeping on hand stock and partly finished monuments, to be finished to order; that the defendant came to his shop and said she would like to get a monument; that he showed her several monuments partially manufactured, among them the one in question, the price of which he told her was $250, when finished with base, cap and plinth, and polished; that she said she had some land, and he said perhaps they might trade with the piece of land; that if he could get a piece of land at a reasonable price he might trade with her; that if she would sell the land at the same price for which she had sold another piece, he would trade with her for the monument; that they went on the land and looked at the lots, for one of which she asked $435; that he told her he would throw off $50 on the monument, calling it $200 complete, if she would throw $35 off on the lot, and would give her $100 cash, and $100 later, and the monument completed with the inscription, for the lot of land; and that to this proposition she agreed, and the lot was selected and agreed on.

There was also evidence that subsequently the plaintiff purchased a plinth, and one of his workmen worked three or four days, fitting and polishing the monument, putting on the cap and mouldings, and one third of the inscription, which the defendant had given him to be put on the monument, at the time of the original contract, was put on, taking three days' work; that the defendant then notified the plaintiff that she would not take the monument, as she had been advised it was too large, and refused thereafter to take it; that subsequently the

plaintiff completed the monument and inscription, and offered to deliver it to her, and pay her $100 cash and give her his note for $100 secured by mortgage on the land, and demanded a deed of the land; that she refused to accept the monument, money and note, and refused to deliver him a deed of the land.

Upon this evidence, the plaintiff contended that he had the right to recover the sum of $200, for furnishing materials and completing the monument, and that if he could not recover for the materials or the monument, he had a right to recover for his labor in completing the monument. The defendant contended that the Gen. St. 1860, c. 105, § 1, cl. 4, and section 5, were a bar to the action. The judge, by consent of parties, before verdict, reported the case for the determination of this court. If, on this evidence, the action could not be maintained, judgment was to be entered for the defendant; otherwise, the case to stand for trial.

ENDICOTT, J. It appears from the report that the defendant orally agreed to convey to the plaintiff a lot of land valued at $400, and to take, in exchange or payment therefor, a monument, estimated to be of the value of $200, when completed, and the balance in money. After the monument was finished, the plaintiff tendered it to the defendant, together with the balance in money, according to the contract. The defendant refused to accept the monument or money, or to give the deed.

Whether this was a sale or an exchange of property is immaterial. Assuming that it was an exchange of the land for the monument, with a balance in money to be paid by the plaintiff, it is to be governed by the same rules as apply to a sale when the whole consideration is to be paid in money. Anon., 3 Salk. 157; Commonwealth v. Clark, 14 Gray, 367, 372; Howard v. Harris, 8 Allen, 297. The contract was therefore within the prohibition of the statute of frauds. Gen. St. 1860, c. 105, § 1, cl. 4. The oral promise on the part of the defendant was not to pay money for the monument, but to convey a lot of land. If the promise had been to pay in money for the monument, when completed, it might have come within the rule, that an agreement to construct or build an article to be paid for when finished need not be proved by a memoradum in writing, as in Mixer v. Howarth, 21 Pick. 205, 32 Am. Dec. 256. But that view of the case cannot be sustained on the evidence as reported; it does not appear to have been the intention of the parties to make any contract, except that which included the conveyance of the land, which was the sole consideration moving from the defendant. That contract was not in writing, and cannot be enforced, in whole or in part. The plaintiff cannot separate that portion which relates to the building of the monument from the whole, and recover upon it as a distinct undertaking. This would be to make a new contract between the parties; for it was no part of the agreement, as stated, to pay $200 in money for the monument, but to allow that sum as a portion of the consideration for the conveyance of the

land. The plaintiff therefore cannot recover, either upon his first or second count, for the value of the monument.

But the plaintiff contends that he may, under his third count, recover for his labor in completing the monument. It is true, that when a person pays money, or renders service, or makes a conveyance, under an agreement within the prohibition of the statute of frauds, and the other party refuses to perform it, an action will lie to recover the money so paid, or the value of the services rendered or the property conveyed; but it is on the ground that a party who has received a benefit, under an agreement which he has repudiated, shall be held to pay, upon an implied assumpsit, for that which he has received. Dix v. Marcy, 116 Mass. 416, and cases cited. In the case at bar, the defendant received no benefit from the labor performed in completing the monument, although the plaintiff may have suffered a loss because he is unable to enforce his contract, and no recovery can be had for the labor on the monument, as charged in the account annexed to the third count.

But this rule does not apply to the item for services performed by the plaintiff in preparing the land and foundation. If this refers to the lot of the defendant where the monument was to stand, and the work was done upon it, we cannot say as matter of law that it was not of benefit to the defendant. That is a question of fact to be determined, and, by the terms of the report, the entry must be: Case to stand for trial.[63]

[63] In Boone v. Coe (1913) 153 Ky. 233, 154 S. W. 900, 51 L. R. A. (N. S.) 907, defendant by a verbal contract leased to plaintiffs a farm in Texas for one year, the lease to commence from the date of plaintiffs' arrival at defendant's farm. Pursuant to this contract plaintiffs moved with their families, horses and wagons from Kentucky to Texas, and upon their arrival defendant repudiated the agreement. The court, overruling McDaniel v. Hutcherson (1910) 136 Ky. 412, 124 S. W. 384, sustained a demurrer to plaintiffs' complaint for the expenses incurred upon their trip from Kentucky to Texas and return, saying: "In the case under consideration, the plaintiffs merely sustained a loss. Defendant received no benefit. Had he received a benefit, the law would imply an obligation to pay therefor. Having received no benefit, no obligation to pay is implied. The statute says that the contract of defendant made with plaintiffs is unenforceable. Defendant, therefore, had the legal right to decline to carry it out. To require him to pay plaintiffs for losses and expenses incurred on the faith of the contract without any benefit accruing to him would, in effect, uphold a contract upon which the statute expressly declares no action shall be brought."

In Seymour v. Oelrichs (1909) 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154, plaintiff, at defendant's request, gave up a life position on the police force to accept employment under defendant for ten years in accordance with a parol contract, which contract defendant declined to perform. The court allowed plaintiff damages in an action on the contract, holding that because of plaintiff's change of position in reliance on such contract the defendant was estopped to plead the Statute of Frauds.

FABIAN v. WASATCH ORCHARD CO.

(Supreme Court of Utah, 1912. 41 Utah, 404, 125 Pac. 860.)

Appeal from District Court, Salt Lake County; Geo. G. Armstrong, Judge.

Action by Ferd J. Fabian against the Wasatch Orchard Company. Judgment for plaintiff, and defendant appeals.

STRAUP, J. The complaint is in two counts. One that the plaintiff, a merchandise broker, rendered services for the defendant, a Utah corporation engaged in canning and selling fruits and vegetables, in advertising, introducing, and selling its products in Eastern markets, in consideration of which it, by a written agreement, agreed to give the plaintiff the exclusive right for three years to sell, as a broker, all its manufactured products in the state of Utah and in southern Idaho, for which the plaintiff was to have a brokerage of 2½ per cent. of the amount of all sales made by him or by others in such territory during such time. In the second count, it is alleged that the plaintiff, at the instance and request of defendant, rendered services for it in advertising, introducing, and selling its products in Eastern markets, and there creating a market for its products, which services were reasonably worth the sum of $6,000.

The case was tried to the court, without a jury. The court found: That the defendant had invested a considerable sum of money in growing asparagus for canning purposes, and that the asparagus plants had reached a stage where they would be producing in considerable quantities. That the defendant was heavily in debt and in straightened financial circumstances. That it had a large quantity of such product on hand, but had no market or outlet for it. That it desired to convert the products into cash, regardless of the profit from the sales thereof, and to create a market therefor in Eastern cities, especially in Kansas City, St. Louis, Cincinnati, Chicago, Pittsburgh, Boston, New York, and Philadelphia, and to advertise and introduce its products in such markets. That thereupon the plaintiff, a merchant broker at Salt Lake City, at the solicitation and request of the general manager of the defendant, and for and on its behalf, visited such cities and there advertised the defendant's products, and devoted time and services in introducing them and in creating a market for them, and solicited and obtained orders amounting, at the prices fixed for the products, to the aggregate sum of between $30,000 and $35,000. That the defendant accepted the benefit of such services, and, to the extent of its capacity, filled such orders to the amount of at least $16,000, and that the reasonable value of plaintiff's services was $2,300.

The court further found that, in consideration of the services to be rendered, the defendant's general manager orally agreed to give plaintiff for three years the exclusive right to sell the defendant's products in Utah and Southern Idaho, and to give him 2½ per cent. commission

of all sales made in such territory during such time, either by himself or others. The oral contract was made about the 18th day of April, 1909. The services rendered by plaintiff, and for which compensation is sought, were rendered by him between that day and the 23d day of May of that year. The contract was reduced to writing in December, 1909, and was signed and delivered in the name of the defendant and by the person purporting to act as its general manager, the same person who made the oral contract with the plaintiff. The court found that the person so acting was the defendant's general manager when the oral contract was made, and that he then had authority to make such a contract, but that when the written contract was made he then was not its general manager, and was not in its employ, he having theretofore left it, and hence found that the written contract was unauthorized, and was not the defendant's contract. The defendant, after the rendition of the services, repudiated the contract, notified the plaintiff to that effect, and refused to ratify, confirm, or approve it, or to be bound by it. The court also found that the oral contract, though made by an authorized agent of the defendant, nevertheless was unenforceable, because by its terms it was not to be performed within one year, and was therefore within the statute of frauds. The court further found that in January, 1910, the defendant discontinued the business of canning fruits and vegetables, and in the spring of that year sold and disposed of its business.

Upon the findings, and in response to the second count of the complaint, the court rendered judgment in favor of the plaintiff for the sum of $2,300, the reasonable value of the services rendered by the plaintiff and received and accepted by the defendant. From the judgment, the defendant appeals.

In its brief it states the proposition for consideration to be: "There is but one question in this case, and that is: Was the defendant enriched in any manner by the part performance of the oral contract, which was within the statute of frauds, and what was the value of that enrichment? In other words, what was the value of the benefits received by the defendant from the part performance of the oral contract by the plaintiff?"

Both parties agree that the law on the subject is as stated in Browne on Statute of Frauds (5th Ed.) § 118a, that "the rule that, where one person pays money or performs services for another upon a contract void under the statute of frauds, he may recover the money upon a count for money paid, or recover for the services upon a quantum meruit, applies only to cases where the defendant had received and holds the money paid or the benefit of the services rendered;" and, as stated in 29 Am. & E. Ency. Law (2d Ed.) p 836, that, "although part performance by one of the parties to a contract within the statute of frauds will not, at law, entitle such party to recover upon the contract itself, he may nevertheless recover for money paid by him, or property delivered, or services rendered, in accordance with and upon the faith

of the contract. The law will raise an implied promise on the part of the other party to pay for what has been done in the way of part performance. But this right to recover is not absolute. The plaintiff is entitled to compensation only under such circumstances as would warrant a recovery in case there was no express contract; and hence it must appear that the defendant has actually received, or will receive, some benefit from the acts of part performance. It is immaterial that the plaintiff may have suffered a loss, because he is unable to enforce the contract."

But the defendant asserts that under the facts found by the court the "benefits" received by the defendant cannot be measured by ascertaining and determining the reasonable value of the services rendered by plaintiff, and accepted and received by the defendant, but by ascertaining and determining whether the services resulted to the defendant's profit or gain, whether it "was enriched" thereby, and, if so, "what was the value of that enrichment?" Hence it urges that the court erred in permitting the plaintiff to prove the reasonable value of the services, and in giving the plaintiff a judgment for the sum of $2,300, the found reasonable value thereof, and further assails the judgment for the reason, as contended by it, that the products sold by it in the Eastern markets on the orders solicited and procured by the plaintiff were sold for less than cost of manufacturing them, and were therefore sold, not to the defendant's profit or gain, but to its loss; and hence the defendant received no "benefit" from the services rendered by the plaintiff and accepted and received by it.

It is not contended that the services rendered by the plaintiff, or the orders obtained by him, were not rendered or obtained in accordance with the contract. No such claim is made. The claim made is that the defendant did not profit, "was not enriched," by the transaction. The defendant's contention leads to this: If A. should orally employ B. for a period of three years to do the labor in the manufacture of 100,000 brick (assuming such a contract to be within the statute of frauds), and if B., on the faith of and in accordance with the contract, should, within the first nine months, make and produce 20,000, which were received and accepted by A., and A. should then repudiate the contract and refuse to longer engage B.'s services, B. could not recover the reasonable value of the services on a quantum meruit, but to entitle him to recover it would be essential for him to show that the market value of the brick so made by him and received by A. was more than the cost of manufacture; otherwise A. received no "benefit" from B.'s services. Or, if A. should orally employ B. to work on his farm for a term of three years and agree to give him 10 acres of land at the end of that period, and if B., on the faith of the contract, should work nine months on the farm for A. in tilling the soil, sowing grain, and reaping crops, and A. should then repudiate the contract and refuse to longer engage B.'s services, again B. could not recover the reasonable value of his services; and if it were made to appear that because of

drought or a falling market, or other causes not due to his negligence or willfulness, the market price of the products was less than the cost of production, then A. received no benefit from B.'s services, and the latter could not recover from the former.

We think appellant's notion of what is meant by "benefit," as the term is used by text-writers and courts, and applied in cases of the nature under consideration, is not borne out by the authorities. The texts and cases cited by it do not support its contention. Dowling v. McKenney, 124 Mass. 478, is cited. There A. orally agreed to convey land to B., and to take in exchange or payment a monument to be made by B. B. finished the monument and tendered it with the money; but A. refused to receive the monument, and refused to convey. There A. did not receive or accept the monument. He did not receive or accept the fruits of B.'s services, and hence received no benefit. Had he received and accepted the monument and then repudiated the contract and refused to convey, then, clearly, B. would have been entitled to recover the reasonable value of the monument so delivered to and accepted by A. The case in no wise makes against that doctrine, and falls within the rule stated in 20 Cyc. 299, that, "where services are rendered on an agreement which is void by the statute, an action will lie on the implied promise to pay for such services; but the promise is implied, not from the services alone, but from the benefit to defendant as well, and if defendant has received no benefit, as, for instance, where work has been performed on a chattel which is never delivered, there can be no recovery." To that effect is also the cited case of Banker v. Henderson, 58 N. J. Law, 26, 32 Atl. 700.

We are also referred to Henrikson v. Henrikson, 143 Wis. 314, 127 N. W. 963, 33 L. R. A. (N. S.) 534. That was an action to enforce specific performance of an oral contract to convey real estate upon performance by the purchaser and the making of valuable permanent improvements on the land by him. The lower court denied and the appellate court granted specific performance of the contract. The case is not in point, and does not decide anything in support of the appellant here.

Bristol v. Sutton, 115 Mich. 365, 73 N. W. 424, is also cited. There a minor was emancipated and left home. Shortly afterwards his uncle agreed to give him $1,000 if he would return home and remain with and assist his father on the father's farm until he should attain his majority. The minor carried out the agreement. It was held that, the contract being within the statute of frauds, the approval by the uncle of the minor's conduct was not such a subsequent act as to create an obligation to pay; and that, since the uncle had derived no benefit from the plaintiff's labor, the contract was void.[64] This case also falls within the rule stated in Dowling v. McKenney, supra, and in no way supports the defendant's contention.

[64] But see Clement v. Rowe (1914) 33 S. D. 499, 146 N. W. 700.

It is unnecessary to review in detail all the cases cited by appellant. An examination of them will show that they do not support any such doctrine as is contended for by it. We think the well-established rule is that, where one who, not in default, on faith of and in accordance with a contract unenforceable because within the statute of frauds, but not malum prohibitum nor malum in se, has, in pursuance of the contract, rendered services for the adversary party, who, with knowledge or acquiescence, accepted them and received the benefit of them and repudiated the contract, he may recover on a quantum meruit the reasonable value thereof—not the profit or gain resulting to the adversary party by reason of the transaction, nor the loss suffered or sustained by the other, but compensation for the reasonable value of the services rendered by the one and accepted and received by the other. Page on Contracts, c. 74; Vickery v. Ritchie, 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810; Stout's Adm'r v. Royston (Ky.) 107 S. W. 785; Cozad v. Elam, 115 Mo. App. 136, 91 S. W. 434; Appeal of Hull v. Thomas, 82 Conn. 647, 74 Atl. 925; Wojahn v. Nat'l Union Bank, 144 Wis. 646, 129 N. W. 1068; Jackson v. Stearns, 58 Or. 57, 113 Pac. 30, 37 L. R. A. (N. S.) 639, Ann. Cas. 1913A, 284; Patten v. Hicks, 43 Cal. 509; Lapham v. Osborne, 20 Nev. 168, 18 Pac. 881; Snyder v. Neal, 129 Mich. 692, 89 N. W. 588; Werre v. Thresher Co., 27 S. D. 486, 131 N. W. 721.

We see nothing in appellant's cases which makes against this. On this theory the case was tried and the judgment rendered. We think it should be affirmed, with costs. It is so ordered.[65]

FORD v. STROUD.

(Supreme Court of North Carolina, 1909. 150 N. C. 362, 64 S. E. 1.)

Appeal from Superior Court, Columbus County; Lyon, Judge.

Plaintiff sues for the recovery of money paid defendant on account of the purchase money of a tract of land under a parol contract to purchase, and for compensation for improvements put upon the land while in possession under the contract. He sets out in his complaint the contract, alleges the payment of the money, and that he put the improvements on the land, and the refusal of defendant to make a deed. Defendant does not specifically deny these allegations, but sets up new matter, by way of avoidance, etc. Plaintiff testified: That defendant proposed to sell him the land, and he agreed to buy it for $750. He paid defendant $200 on account of the purchase money and went into possession. The contract was not reduced to writing.

[65] See 61 University of Pennsylvania Law Review, 330.
Compare Mooney v. York Iron Co., page 380, infra; Vickery v. Ritchie (1909) 202 Mass. 247, 88 N. E. 835, 26 L. R. A. (N. S.) 810, a case of mutual mistake, where the same rule of damages was applied. (The facts of this case are stated, page 121, note, supra.)

Plaintiff paid an additional $200, stayed on the land two years making valuable improvements, buildings, etc., and "had to leave." Defendant returned $80 of the amount paid. When plaintiff demanded of defendant a deed for the land, he told him to call on Mr. D. L. Gore, who would make the deed. That he went to Mr. Gore to get a deed, and he refused to give him one. "I told defendant that I wanted him to give my money back, and he refused to do so." Plaintiff testified, without objection, that he put improvements on the land, giving estimate of value. Defendant offered no evidence, but moved for judgment of nonsuit, which was denied, and he excepted. There was a verdict for plaintiff on all of the issues. Judgment and appeal.

CONNOR, J.[66] The defendant's motion for judgment of nonsuit presents the merits of the appeal. The motion admits the plaintiff's testimony to be true. If, upon these facts, he is entitled to maintain the action, the rulings, in regard to the admission of evidence and the instructions, are correct. While the answer does not specifically admit the allegation in the complaint in regard to the contract, it does not contain a general or specific denial, as required by the Code of Procedure.

We think that, upon both reason and authority, the plaintiff is entitled to maintain his action and recover the amount paid on account of the purchase money and compensation for his improvements to the extent of the enhanced value of the land, less profits made by him while in possession. It is true that the contract of purchase, being in parol, is void. It appears that defendant was not able to make title until, by complying with the terms of a bond which he held from D. L. Gore, he acquired one himself, and this he has failed to do, resulting in plaintiff's losing the land. In Ellis v. Ellis, 16 N. C. 402, it was held that a party who had paid the purchase money for land, under a parol contract which was repudiated by the vendor, was not entitled to maintain a bill in equity, either for specific performance because of the statute of frauds, or for the amount paid on the purchase price. The reason given by Ruffin, C. J., is: "Because so far as concerns the land the contract is merely void, and the money can be recovered at law in an action for money had and received."

There is, in such cases, a total failure of consideration, and, as it would be inequitable to permit the vendor to repudiate his contract and retain the money paid upon it, the law gives to the vendee an equitable action, based upon an implied assumpsit for money had and received. The right to be reimbursed for the payment of the purchase money on a parol contract, for the purchase of land, repudiated by the vendor, and have compensation for betterments made while in possession under the contract has, in many cases, been enforced by courts of equity, by enjoining the eviction of the vendee until the money paid on the purchase price has been repaid and compensation for improvements made. In Albea v. Griffin, 22 N. C. 9, the bill was for specific

[66] The statement of facts is abridged, and a portion of the opinion, discussing the validity of plaintiff's tender, is omitted.

performance of the contract. The defendants relied upon the statute of frauds; the contract being in parol. Gaston, J., said: "We admit this objection to be well founded, and we hold, as a consequence from it, that, the contract being void, not only its specific performance cannot be enforced, but that no action will lie, in law or equity, for damages because of nonperformance. But we are nevertheless of the opinion that plaintiff has an equity which entitles him to relief, and that parol evidence is admissible for the purpose of showing that equity. The plaintiff's labor and money have been expended on improving property which the ancestor of the defendants encouraged him to expect should become his own, and, by the act of God, or the caprice of the defendants, this expectation has been frustrated. The consequence is a loss to him and a gain to them. It is against conscience that they should be enriched by gains thus acquired to his injury." Baker v. Carson, 21 N. C. 381. In Dunn v. Moore, 38 N. C. 364, relief was denied because the contract set up in the bill was denied. Nash, J., said that, if defendant had admitted the contract, the court would not have permitted him to put plaintiff out "without returning the money he had received and compensating him for his improvements."

While, in the case at bar, the contract is not denied, if it had been we should not hesitate to follow the decision in Luton v. Badham, 127 N. C. 96, 37 S. E. 143, 53 L. R. A. 337, 80 Am. St. Rep. 783, in which Mr. Justice Furches reviews this and all of the other cases and shows conclusively that the right to relief cannot be defeated by a mere denial of the contract. See the very able and, the writer thinks, conclusive opinion of Smith, C. J., in McCracken v. McCracken, 88 N. C. 272. Certainly this cannot be done where the action is for the recovery of the purchase money, as upon an implied assumpsit for money had and received, or for money paid for a consideration which has failed. In Daniel v. Crumpler, 75 N. C. 184, Rodman, J., says that the right to recover the purchase money and compensation for improvements against one who has repudiated his parol contract to convey land "stands on general principles of equity." As said by Judge Furches in Luton v. Badham, supra, all of the cases are based upon this theory. It is doubtful whether, prior to the abolition of the distinction between actions at law and suits in equity, an action could have been maintained, at law, for compensation for improvements put upon land by the vendee. The court of equity had granted relief by enjoining the eviction of the vendee by the vendor, who had repudiated his contract until he had made compensation for improvements. Whatever difficulty was encountered because of technical rules of pleading disappears when forms of action are abolished and a plaintiff recovers upon the facts stated in his complaint and proven upon the trial.

The careful review of the authorities and satisfactory discussion in the opinion in Luton v. Badham, supra, and the dissent of Smith, C. J.,

in McCracken's Case, supra, relieves us of the duty of doing more than to refer to them. It is interesting to observe the trend of thought upon the subject as illustrated in the decided cases, showing how the law "works itself pure" and enforces the maxim "that there is no wrong without a remedy." If, as said by Judge Gaston, it is inequitable for a man to make a parol contract to sell land, receive the purchase money, and encourage the vendee to make improvements on it, and, by repudiating the contract, retain the money and take the land, with its enhanced value, certainly the court must find some way, either preventive or remedial, to make him "do equity." We think that it has done so. We cannot perceive any good reason for saying that, so long as the vendee retains possession under the contract, he will be protected in his right, but if, seeing that he can get no title, he surrenders possession, he is without remedy. His honor correctly denied the motion for judgment of nonsuit and admitted the evidence of the contract. * * *

Upon an inspection of the entire record, we find no error.[67]

[67] Accord: Ernst v. Schmidt (1912) 66 Wash. 452, 119 Pac. 828, Ann. Cas. 1913C, 389; Clark v. Davidson (1881) 53 Wis. 317, 10 N. W. 384.

In many jurisdictions, however, recovery for the value of improvements made by a purchaser under a parol contract of sale is denied at law, Shreve v. Grimes (1823) 4 Litt. (14 Ky.) 220, 14 Am. Dec. 117; Welsh v. Welsh (1832) 5 Ohio 425; Cook v. Doggett (1861) 2 Allen (Mass.) 439; though sometimes allowed in equity, Masson v. Swan (1871) 6 Heisk. (53 Tenn.) 450 (improvements and taxes); Vaughn v. Vaughn (1898) 100 Tenn. 282, 45 S. W. 677 (taxes, and money paid in discharge of a mortgage); Fox's Heirs v. Longly (1818) 1 A. K. Marsh. (8 Ky.) 388 (improvements, less value of plaintiff's occupancy); Patterson v. Yeaton (1859) 47 Me. 308.

Similarly the vendee in possession is often allowed to resist ejectment until he is compensated for his improvements (less a reasonable rental for the use of the premises). Padgett v. Decker (1911) 145 Ky. 227, 140 S. W. 152; Pass v. Brooks (1899) 125 N. C. 129, 34 S. E. 228, as modified on rehearing in (1900) 127 N. C. 119, 37 S. E. 151. See Woodward, Quasi Contracts, § 102.

Compare note page 444, infra.

Improvements Made by a Lessee Pursuant to a Parol Contract.—"The facts of this case are that the defendant agreed to grant a lease of a house to the plaintiff for seven, fourteen or twenty-one years, and it was at first part of the agreement that the plaintiff should pay £75. towards certain alterations in the house. Afterwards, the defendant agreed that the plaintiff should send in his workmen to paint the drawing room in a particular manner. Now, it seems to me quite clear that the agreement between the plaintiff and the defendant was never expressed in writing so as to satisfy the Statute of Frauds. The plaintiff cannot, therefore, bring an action on the agreement; but the question remains, can he, under the common counts, recover the amount which he has expended on the house according to the finding of the arbitrator. Now, it seems to me, that what the plaintiff did was very much as if he had paid the £75. into the hands of the defendant after the making of the agreement, in which case he would clearly be entitled to recover back the money. I cannot see that the fact that he has expended the money upon the improvement of the house with the consent of the defendant can make any difference." Pulbrook v. Lawes (1876) 1 Q. B. D. 284, per Lush, J.

CROMWELL v. NORTON.

(Supreme Judicial Court of Massachusetts, 1906. 193 Mass. 291, 79 N. E. 433, 118 Am. St. Rep. 499.)

MORTON, J.[68] This is an action to recover the value of certain real estate conveyed by the plaintiff to the defendant. The case was tried partly on agreed facts and partly on oral testimony. There was a verdict for the plaintiff and the case is here on exceptions by the defendant to certain rulings and refusals to rule in regard to certain matters of evidence and in regard to the statute of frauds and the statute of limitations both of which defenses were set up in the answer.

The plaintiff's case was in substance this: Being about to go to sea he conveyed the land in question to the defendant, who is his sister, in 1880, so that if he did not return she should have it, but with the agreement on her part that if he did return and wanted it at any time she should reconvey it to him. He returned but the fact that he had given the deed of the land in question escaped his attention as he testified till it was recalled to him by her in 1902 in connection with another matter when he demanded a reconveyance of the land which she refused. The defendant contended that she was to sell a part of the land and pay over the proceeds which she did and that as to the rest, being the land in controversy, the conveyance was an absolute one and she denied that there was any such agreement as alleged by the plaintiff.

So far as the statute of frauds is concerned the case comes within the well-settled principle that if one conveys to another land or other property pursuant to an oral agreement which such other party refuses to perform and cannot be compelled to perform because within the statute, the value of the property so conveyed can be recovered by the party conveying it.* Kelley v. Thompson, 181 Mass. 122, 63 N. E. 332; Peabody v. Fellows, 177 Mass. 293, 58 N. E. 1019; Miller v. Roberts, 169 Mass. 145, 47 N. E. 585; Holbrook v. Clapp, 165 Mass. 563, 43 N. E. 508; O'Grady v. O'Grady, 162 Mass. 290, 38 N. E. 196. Recovery is allowed in such a case, not as an indirect way of enforcing the contract which would be contrary to sound principles, but on the ground that the refusal of the defendant to perform constitutes a failure of consideration and he is therefore bound to make the plaintiff whole for what he has got from him. If the defendant is ready to perform, the fact, that the contract is within the statute and he could set up the statute if he chose to, is immaterial. Twomey v. Crowley, 137 Mass. 184. So is the exact nature of the undertaking on the part of the party refusing to perform; whether to hold in trust or to reconvey for instance. See Twomey v. Crowley, supra. It follows that the oral testimony in regard to the agreement to the admission of which the de-

[68] A portion of the opinion, discussing another point, is omitted.

*This is a minority doctrine. See 20 Harvard Law Review, 549, 551 et seq.

fendant objected was rightly admitted, and that the ruling of the court in regard to the statute of frauds was correct.

The statute of limitations did not begin to run until there was a demand for a reconveyance and a refusal, and the agreed facts show that that was not till 1902. Ryder v. Loomis, 161 Mass. 163, 36 N. E. 836.[69] * * *

We see no error in the rulings or refusals to rule or in the instructions to the jury. Exceptions overruled.[70]

[69] In Re Taylor's Estate (1907) 132 Wis. 38, 111 N. W. 229, 122 Am. St. Rep. 943, it was held that, where services were rendered in reliance upon an oral promise to devise land, the Statute of Limitations, in so far as the right to recover upon an "implied contract" was concerned, began to run from the time of the rendition of the service, and not from the death of the promisor. But see, contra, Hull v. Thoms (1910) 82 Conn. 647, 74 Atl. 925.

[70] RECOVERY FOR BENEFITS CONFERRED UNDER CONTRACTS WHICH ARE UNENFORCEABLE BY REASON OF STATUTES ANALOGOUS TO THE STATUTE OF FRAUDS.—In Hoyt v. Paw Paw Grape Juice Co. (1909) 158 Mich. 619, 123 N. W. 529, a statute provided that no debt should be incurred on behalf of a partnership association limited in excess of $500, unless reduced to writing and signed by at least two managers. The plaintiff agreed to work for the defendant partnership association limited for two years at a monthly salary and purchased stock of the association, as a part of the same transaction, to the amount of $1,000. The defendant thereafter failed to perform the contract. The court held that the contract was void, because signed by only one manager, but allowed the plaintiff to recover the money he had paid for the stock, saying: "It is suggested that this statute precludes the making of a contract except by writing signed by two managers, and therefore no implied contract can arise from the acts of the managers or the receipt of the plaintiff's money by defendant, and therefore plaintiff cannot maintain an action for money had and received. The right to bring this action exists whenever a person, natural or artificial, has in his or its possession money which in equity and good conscience belongs to the plaintiff, and neither express promise nor privity between the parties is essential. See Beardslee v. Horton, 3 Mich. 560. 'It is an equitable action, and can be maintained in all cases for money which in equity and good conscience belongs to the plaintiff.' We said, in Moore v. Mandlebaum, 8 Mich. 433: 'We understand the law to be well settled that the action of assumpsit for money had and received is essentially an equitable action, founded upon all the equitable circumstances of the case between the parties; and if it appear, from the whole case, that the defendant has in his hands money, which, according to the rules of equity and good conscience, belongs, or ought to be paid, to the plaintiff, he is entitled to recover: and that as a general rule, where money has been received by a defendant under any state of facts which would in a court of equity entitle the plaintiff to a decree for the money, when that is the specific relief sought, the same state of facts will entitle him to recover the money in this action.'"

See, also, the criticism in Woodward, Quasi Contracts, p. 145, note 3, of the decision in Donovan v. Harriman (1910) 139 App. Div. 586, 124 N. Y. Supp. 194.

RESCISSION OF INFANT'S CONTRACT.—The right of an infant to recover the consideration paid by him upon his rescission of a contract because of his infancy is quasi contractual. There is a serious conflict of authority as to whether he can recover unless he can and does make restitution of the benefit received by him under the contract. See Tiffany, Persons and Domestic Relations, §§ 214, 215.

II. Plaintiff Repudiates

COLLIER v. COATES.

(Supreme Court of New York, 1854. 17 Barb. 471.)

This was an appeal from a judgment of the Steuben county court. The action was commenced before a justice of the peace, to recover back the sum of $65 which had been paid by the plaintiff upon a parol contract for the sale of a farm by the defendant to the plaintiff. The complaint was for money lent, and money paid. The defendant denied the allegations in the complaint, and stated that if he had received any money from the plaintiff it was upon the condition that the defendant would enter into a written agreement with the plaintiff, at a future day, which the defendant alleged he was, and at all times had been, ready to do, and he further averred that he had suffered great damage and expense by reason of the plaintiff not performing his agreement. A parol agreement between the parties, for the sale of the defendant's farm to the plaintiff, was proved, and the price was agreed upon. The plaintiff paid to the defendant $65 upon the contract, and was to pay, within a week or ten days, enough more to make $200; and then a written contract was to be executed by the parties. Subsequently the plaintiff came back and told the defendant he could not make out the $200, and therefore could not take the farm, and he sent word to the defendant, by his son, that he, the defendant, might have the $65 the plaintiff had paid him for his damages, or he might pay back some part of it if he could afford to. The jury found a verdict in favor of the plaintiff for $65, and the justice rendered judgment for that sum, with costs. On appeal the county court affirmed the judgment.

Johnson, J.[71] I regard the rule as well settled in this country, at least, that where a person has paid money upon a parol contract for the purchase of lands, which is void by the statute of frauds, he cannot maintain an action to recover back the money so paid, so long as the other party to whom the money has been paid is willing to perform on his part.

The doctrine has been twice distinctly declared in our own court, where the question was directly before it. Abbott v. Draper, 4 Denio, 51; Dowdle v. Camp, 12 Johns. 451. The same question has been decided in the same way repeatedly in several of the courts of our sister states, where the point was directly involved. Coughlin v. Knowles, 7 Metc. (Mass.) 57, 39 Am. Dec. 759; Thompson v. Gould, 20 Pick. (Mass.) 134, 142; Duncan v. Baird, 8 Dana (Ky.) 101; Lane v. Shackford, 5 N. H. 133; Shaw v. Shaw, 6 Vt. 75; Richards v. Allen, 17 Me. (5 Shepley) 296; Sims v. Hutchins, 8 Smedes & M. (Miss.) 328, 47 Am. Dec. 90; Beaman v. Buck, 9 Smedes & M. (Miss.) 207; Mc-

[71] A portion of the opinion is omitted.

Gowen v. West, 7 Mo. 569, 38 Am. Dec. 468; Rhodes' Adm'r v. Storr, 7 Ala. 346; Dougherty v. Goggin, 1 J. J. Marsh. (Ky.) 374; Bedinger v. Whittamore, 2 J. J. Marsh. (Ky.) 563. In several of the cases above cited, the facts are almost identical with those of the case at bar. All the cases agree that if the party receiving the money refuses to perform the agreement, such as it is, on his part, the action lies. * * *

But it is contended by the learned and ingenious counsel for the plaintiff that neither Dowdle v. Camp, nor Abbott v. Draper, are authorities against the plaintiff's right to recover, because in each of those cases the plaintiff was in possession of the premises purchased, and might have enforced a specific performance of the agreement in a court of equity. In that respect, it is true, the two cases above cited differ from the case here, although several of the other cases cited do not. But I am unable to perceive how that circumstance affects the principle upon which the plaintiff claims the right to recover. The foundation of his claim is that the money was paid without consideration. That is, that having been paid upon a promise made by the defendant which the law would not compel him to perform, nor mulct him in damages for refusing to perform, and which was, in short, void by statute, it was paid without any consideration whatever, which the law notices or regards. But this condition of the parties is not in the least altered by the purchaser's going into possession, so far as the validity and force of the agreement is concerned. It is still void by the statute of frauds, notwithstanding the possession. Nothing is better settled than this, that part performance of a parol contract void by statute, does not take it out of the statute, or give it any validity in law as a contract.

To whatever extent either or both of the parties may have gone in the performance of such a contract, it still remains of no legal or binding force in law, in every stage up to its full and final performance and execution by both. If it is conceded that possession by the plaintiff, in addition to the payment, would have operated to defeat the recovery of the money paid, the whole ground of controversy is surrendered. It could make no difference as regards the right of action, so far as the question of consideration is concerned, whether the defendant had in fact performed in part or whether he was willing and offered to perform. Besides, when the other party is willing and offers to perform, the question as to whether the plaintiff could compel him to do so in case of his refusal, does not arise. It is clear enough that in case of a refusal the action lies, and the refusal is the ground upon which the action for the recovery is based. Certainly a willingness or an offer to perform must be regarded as placing the defendant in as favorable a situation, as part performance, as regards the action at law.

Courts of equity, in decreeing the specific performance of such contracts, do not proceed upon the ground that the contract has any force or validity in law, but only that it is binding in conscience, and its performance specifically is decreed, expressly to prevent fraud, and for

the very reason that in law it is of no force. What courts of equity might do, or refuse to do, can have no bearing upon the legal effect of such a contract. The last act or payment by either party, or both, short of full performance, is as much without consideration in law as the first. If the rules of equity are to be permitted to affect the legal right of recovery, the defendant may safely invoke them in his behalf in the present case. But they are not; and in determining the question here, in the action at law, they may as well be laid entirely out of view. It is by no means a universal rule that money paid, without a consideration good in law, may be recovered back. There are several exceptions to it. And I take this to be one which is well established by numerous adjudications.

The contract here upon which the money was paid, although it was so far void that the law would lend no aid in enforcing it, was not contrary to law. It was neither immoral nor illegal. It was one which the parties had a right to make and carry out. There was no fraud or mistake of facts. The money was voluntarily paid by the plaintiff, upon a promise made by the defendant, which the former knew at the time he could not oblige the latter to perform, but which promise nevertheless he agreed to accept as a sufficient consideration for the money parted with. The money was not received by the defendant as a loan, but as a payment. It was not received to the plaintiff's use. And as long as the defendant is willing to do what he agreed to do, in consideration of the payment, the law will not presume any promise to repay it, but will leave the parties to stand where they voluntarily placed themselves by their arrangement, until the defendant refuses to carry it out. Cases of great hardship are suggested as a reason for the adoption of the rule contended for by the plaintiff's counsel. One of which is, that otherwise the purchaser under such a contract might go on making payments until the last; and although satisfied his bargain is not an advantageous one, yet bound to make his payments or lose what he has paid, while the other party all this time is at perfect liberty to repudiate the arrangement, and may do so at the last moment, to the serious injury of the purchaser. And it is asked if it is right to give one party such an advantage over the other? It would be easy to suggest cases of hardship on the other side, if the right to recover in any case were to be controlled by any such considerations. Take the case at bar, for an example. The evidence shows that when the plaintiff entered into the arrangement with the defendant and made the payment, the latter was engaged in putting in a crop of wheat. That the plaintiff requested the defendant to suspend operations, as he would want to put the land to some other use, and that the defendant did suspend, and waited, expecting the plaintiff to fulfill his engagement, until it was too late to put in his crop; in consequence of which he was injured to the amount of over $100.

But suppose the whole purchase price had been paid, and the defendant, in the confident expectation of the plaintiff's acceptance of

the title, had gone and purchased another farm with the money, and involved himself in liabilities which would be utterly ruinous should the other party be allowed to repudiate and recover back the money. It may be asked, would it be right to allow him to do so? It is sufficiently obvious, however, that neither the plaintiff's right to recover back the money, nor the defendant's right to retain it, can rest in, or derive any aid from, such considerations as these. The principle which governs is more fixed and stable. It is clear that, by the rules of equity, the plaintiff could not recover until he had first made the defendant whole for the damage he had occasioned by the breach of his engagement, or offered to do so. And the law will not, I think, aid the party thus in the wrong, by presuming a promise of repayment, in his favor, until the other party shall refuse to go on and carry out the agreement upon which the money was paid. The rule which I suppose to be established, seems to me to be one founded in reason and good sense, which ought to be upheld. And I regard it as being too well settled upon authority to be departed from, except upon the most cogent reasons, and from the clearest convictions of its unsoundness.

I am of opinion, therefore, that the judgment of the county court and that of the justice should be reversed.[72]

[72] In Thomas v. Brown (1876) 1 Q. B. D. 714, 722, Mellor, J., said: "Now, is there anything unconscientious in the defendant keeping this money? I can see nothing. The breaking off of the agreement was not in any sense the fault of the vendor. He was always ready and willing to complete the purchase and execute a conveyance, but the vendee chooses to set up this question about the Statute of Frauds, and to say, 'Although I can have the contract performed if I please, I repudiate it.' Under these circumstances, I think it would be quite monstrous if the plaintiff could recover, and I am glad to think that the authorities are all opposed to her claim."

In Lane v. Shackford (1830) 5 N. H. 130, plaintiff paid money and rendered services in return for defendant's oral promise to convey land. The court said: "We are of the opinion that the plaintiff is not at liberty to treat the contract for the sale of land in this case as void, unless the defendant has refused, or disabled himself, to perform it. If one man contracts with another to perform labor, and receive as a compensation the conveyance of a particular tract of land, although the contract to convey the land is not a proper foundation for an action, yet still common honesty and fair dealing require that he shall not be at liberty to refuse the land, and demand money, until the other party has refused to execute the contract."

In Shaw v. Shaw (1834) 6 Vt. 69, plaintiff contracted to support defendant, her mother-in-law, for life in consideration of an oral promise to convey certain land to plaintiff. After part performance plaintiff repudiated the contract and brought action to recover the value of the support furnished. In holding for defendant the court said: "It is urged for the plaintiff, that this was a contract for the sale of land, or an interest therein, and void under the statute, not binding on the defendant, and therefore, for want of reciprocity, not binding on the plaintiff; and it is therefore concluded the plaintiff is entitled to recover for the support rendered. The statute does not declare such parol contracts void. It only provides that no action shall be maintained thereon, and in this case the action is not on the contract—it is the defence which is thereon. The statute applies only to executory contracts, not to those in whole or in material part executed. Therefore, when one party has partly performed under such a contract, he cannot recover for what he has done, unless the other party insist upon the statute, and refuse to per-

ABBOTT v. INSKIP.

(Supreme Court of Ohio, 1875. 29 Ohio St. 59.)

Motion for leave to file a petition in error to the District Court of Brown county.

The plaintiff, an infant, sued the defendant to recover the value of work and labor performed by the plaintiff for the defendant between February, 1871, and February, 1875.

The defendant in his answer set up that the work and labor sued for were rendered under a verbal contract entered into between the defendant and the plaintiff's mother in the year 1864.

That at the date of the contract the plaintiff was only nine years old, and was in the custody and under the control of his mother, who was entitled to his earnings and labor during infancy. By the terms of the contract the plaintiff was to live with and serve the defendant until he arrived at twenty-one years of age, in consideration of which defendant was to provide him with food, clothing, medicine, and education, etc., and, upon arriving at age, was to give him a horse, saddle, bridle, etc. That the defendant had performed, and was willing to perform all the conditions on his part, but the plaintiff without cause had left his home and service before arriving at age.

A demurrer to the answer was overruled, and plaintiff replied.

On the trial in the court of common pleas verdict and judgment were rendered for the defendant. This judgment was affirmed by the district court.

All the errors assigned may be considered as arising on the charge given to the jury by the court of common pleas, which was as follows: "If you find from the evidence that the defendant entered into the contract set up in his answer, and that the services sued for were rendered to the defendant in pursuance of said contract, and that the defendant has performed the contract upon his part, and that the plaintiff without just cause left the service of defendant without his consent, then the plaintiff can not recover, and your verdict must be for defendant. But if the services were not rendered to the defendant, under the contract claimed by the defendant, then the plaintiff is entitled to recover such sums as his work and labor was reasonably worth, or if the plaintiff went to live with the defendant under the contract claimed by defendant, and without cause was dismissed by the defendant, he may recover what his work was reasonably worth."

McILVAINE, J. There is no question made as to the right of the

form. This is too obviously just to require comment, and to disregard it would do violence to every leading principle. The contract cannot be considered void so long as he, for the protection of whose rights the statute is made, is willing to treat and consider the contract good."

See, also, to the same effect: Cobb v. Hall (1857) 29 Vt. 510, 70 Am. Dec. 432; Frey v. Stangl (1910) 148 Iowa, 522, 125 N. W. 868; Perkins v. Allnut (1913) 47 Mont. 13, 130 Pac. 1.

plaintiff's mother to have bound him by a written contract duly executed.

The contention of the plaintiff in error is:

1. That the agreement set up in the answer was void under the statute of frauds.

2. That the plaintiff in error was not bound by it under the statute concerning apprentices and servants.

It is true that the agreement could not have been performed within a year from the making thereof, and, therefore, under the statute of frauds, it could not have been enforced by action. It might, however, have been performed by the parties, and, when performed, the parties would have been bound by it; or, if the plaintiff had performed, the defendant would have been bound to perform it on his part.

The plaintiff in his action below relied on an implied promise, on the part of the defendant, that he would pay the plaintiff the reasonable value of his services. The express promise contained in the agreement, under which the plaintiff assumed to render the service, excludes the presumption of the implied promise relied on. The default of a defendant, or his refusal to go on with a contract which falls within the statute of frauds, is an essential condition of the right to recover for services rendered under it. It is only in cases where the defendant, by reason of his own breach of such contract, is estopped from setting it up as a defense that an action for the value of the work done under it can be maintained.

That the contract was not executed in conformity to the statute concerning apprentices and servants is not a good reply to such contract. Such want of conformity no doubt discharged the plaintiff from the duty of remaining with the defendant. But, upon his voluntary withdrawal from the service, it gave him no right of action to recover for services rendered under the contract for the reasons above stated.

Motion overruled.[78]

KING v. WELCOME.

(Supreme Judicial Court of Massachusetts, 1855. 5 Gray, 41.)

Action of contract on a quantum meruit, for work and labor done by the plaintiff for the defendant. Trial in the court of common pleas. The defence relied on was that the work and labor were done under an entire contract for one year, and that the plaintiff wrongfully left the defendant's service before the year expired. It appeared that the contract was not in writing, and bound the plaintiff to labor for one year, to commence at a future day, two or three days after the making of the contract. The plaintiff contended that it was invalid, as being within the statute of frauds, and could not be set up in defence of this

[78] **Accord:** Galvin v. Prentice (1871) 45 N. Y. 162, 6 Am. Rep. 58.

action. Byington, J., so ruled, and directed a verdict for the plaintiff, and the defendant alleged exceptions.

THOMAS, J. This was an action of contract on a quantum meruit, for labor done by the plaintiff for the defendant. The amount and value of the plaintiff's services were not disputed, but the defendant relied upon an express contract by which the plaintiff was to work for an entire year, and a breach of such contract by wrongfully leaving the plaintiff's service before the year expired. That contract was not in writing. By its terms, the plaintiff was to labor for one year from a day future. The plaintiff said that contract was within the statute of frauds, and could not be set up in defence to the action. So the court ruled.

Rightly, we think; though, in the light of the authorities, the question is a nice and difficult one.

Upon the reason of the thing, and looking at the object and purpose of the statute, the result is clear. So far as it concerns the prevention of fraud and perjury, the same objection lies to the parol contract, whether used for the support of, or in defence to an action. The gist of the matter is, that, in a court of law, and upon important interests, the party shall not avail himself of a contract resting in words only, as to which the memories of men are so imperfect, and the temptations to fraud and perjury so great.

The language of our statute is, that "no action shall be brought upon any agreement that is not to be performed within one year from the making thereof," "unless the promise, contract or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." Rev. St. 1836, c. 74, § 1, cl. 5.

Looking at the mere letter of the statute, the suggestion is obvious, that no action is brought upon this contract. But the defendant seeks to "charge the plaintiff therewith," to establish it by proof, to enforce it in a court of law, and to avail himself of its provisions. And if the defence succeeds, the plaintiff is in effect charged with and made to suffer for the breach of a contract which he could not enforce, and which could not be enforced against him.

The difference, it is clear, is not one of principle. To illustrate this, let us suppose that in the contract, which the defendant seeks to set up in defence, there had been a provision for the payment of the wages stipulated, by semi-annual instalments. If, upon the expiration of the six months, the plaintiff had brought an action upon the contract to recover the instalment, the action could not be maintained, the statute of frauds would be a perfect defence. This is settled in the recent case of Hill v. Hooper, 1 Gray, 131. But if, in an action brought for money lent or goods furnished to himself or family, he may avail himself of the instalment, by way of set-off or payment; the difference is merely one of form, and not of substance.

Still further, upon the construction of the statute contended for by the defendant, the laborer in the contract stated would be without remedy. For if he brought his action upon the contract for the instalment, the statute of frauds would be a bar; if upon a quantum meruit, the express contract to labor for a year would be a bar.

The sounder construction of the statute, we think, is that a contract within its provisions is one which neither party can enforce in a court of law. Carrington v. Roots, 2 M. & W. 248; Reade v. Lamb, 6 Exch. 130; Comes v. Lamson, 16 Conn. 246. The cases in the exchequer go farther than is necessary to sustain the rule stated. They hold the contract, as a contract, is void, because it is a contract of which a party cannot avail himself in a court of law. Upon this point the recent case of Leroux v. Brown, 12 C. B. 801, is in conflict with them.

This court has not treated the contracts as absolutely void. When fully executed, they define and measure the rights of the parties thereto. And if this contract had been fully executed, and the plaintiff had earned the price stipulated, and had then brought quantum meruit on the ground that his services were reasonably worth more, the contract so executed would have been a full answer. Stone v. Dennison, 13 Pick. 1, 23 Am. Dec. 654. But this contract was not performed; it was, to a great extent, executory. For breach of it by the defendant, no action could be maintained by the plaintiff. Nor, by parity of reason, can the plaintiff's breach of it be set up to defeat his reasonable claim for services rendered.

But though a contract within the statute of frauds, as a contract, cannot be enforced in a court of law, it may be available for some purposes.

A parol contract for the sale of land, though not enforceable as a contract, may operate as a license to enter upon the land, and, until revoked, be a good answer to an action of trespass by the owner.

So where money has been paid upon a parol contract for the sale of land, it cannot be recovered back, if the vendor is willing to fulfil the contract on his part. This is settled in the recent case of Coughlin v. Knowles, 7 Metc. 57, 39 Am. Dec. 759, a case which certainly resembles the one at bar, but which may be clearly distinguished from it. That action rests upon an implied assumpsit. The implied promise arises only upon the failure of the consideration upon which the money was paid. The plaintiff fails to show any failure of consideration. He shows the money was paid upon a contract not void, and which the defendant is ready to perform. The consideration upon which it was paid exists unimpaired. If the defendant had refused to convey, or if, as in the case of Thompson v. Gould, 20 Pick. 134, the property had been destroyed by fire, so that the contract could not be performed by the vendor, there would be a failure of consideration, from which an implied promise would arise, and the action could be maintained.

In the case at bar, the plaintiff shows services rendered for the de-

fendant, and their reasonable value. The defendant, admitting the performance of the labor and its value, says the plaintiff ought not to recover, because he made an entire contract for a year, which he has not fulfilled. The plaintiff replies, that contract was for work for a year from a day future; it was within the statute of frauds; it was not in writing; it was not executed, and cannot be used in a court of law, either as the basis of an action, or to defeat a claim otherwise just and reasonable.

In the case of the money paid upon a contract for the sale of land, the action fails because no failure is shown of the consideration from which the implied promise springs.

In the case at bar, the defence fails because the contract upon which the defendant relies is not evidenced as the statute requires for its verification and enforcement. For it is the whole contract, of which the defendant seeks to avail himself. His defence is not that as to so much as is executed, as to so much time as the plaintiff has labored, he labored under the contract, and the price stipulated is to govern. But he relies upon the contract not only so far as it is executed, but so far as it is still executory. He seeks first to establish the parol agreement as a valid subsisting contract, and then to charge the plaintiff with a breach of it.

A construction of the statute, which would sanction this use of the contract, would lose sight of the obvious purposes of the statute. It would adhere to the letter at the expense of the spirit. It would operate unequally upon the parties. The weight of authority is against it.

Exceptions overruled.[74]

[74] Accord: McGartland v. Steward & Clark (1860) 2 Houst. (Del.) 277; Bernier v. Cabot Manufacturing Co. (1880) 71 Me. 506, 36 Am. Rep. 343.

Collins v. Thayer (1874) 74 Ill. 138—an action by a purchaser of land under a parol contract to recover instalments paid by him on the ground that he was thereafter evicted by holder of paramount title—contains a dictum to the same effect.

See, also, Grace v. Gholson (1914) 159 Ky. 359, 167 S. W. 420 (vendee of land under parol contract can recover purchase money paid, even though defendant tender a conveyance before trial).

In Riley v. Williams (1878) 123 Mass. 506, plaintiff agreed with defendant by parol contract to do certain work for defendant and to accept in payment therefor blacksmithing work to a certain amount and a conveyance of a building lot to be selected by plaintiff from certain ones owned by defendant. The plaintiff, having completed the work called for by the contract brought suit in assumpsit for the value of his work and labor. The court held that, if defendant was ready and willing to convey the land and to furnish the blacksmithing work, "it is not for the plaintiff to object that this special contract was not binding because it was not in writing." Contrast Koch v. Williams (1892) 82 Wis. 186, 52 N. W. 257 (facts stated in note, page 351, infra).

SALB v. CAMPBELL.

(Supreme Court of Wisconsin, 1886. 65 Wis. 405, 27 N. W. 45.)

Appeal from the County Court of Milwaukee County. The case is stated in the opinion.

TAYLOR, J.[75] This action was brought by the appellant to recover of the respondents for the services of his minor son, Joseph Salb. The complaint alleges that said Joseph worked for the respondents from August 1 to September 15, 1882, for the agreed price of five dollars per week, and that the services were reasonably worth that sum; that he also performed extra work during that time, which was reasonably worth five dollars per week; that the extra work amounted to four days; and claimed as damages, $36.66. The defendant answered first by a general denial; and then alleged "that in February, 1881, they entered into an agreement with the plaintiff, which agreement was sanctioned and ratified by said Joseph Salb, and was as follows: Said Joseph Salb agreed to work for the defendants as an apprentice to learn the moulder's trade for the term of four years from the first of February, 1881, at and for the agreed price of $3.50 per week for the first year; $5, second year; $6.50, third year; and $8, fourth year,—this being an increase of $1.50 each week during the continuance of the four years; that plaintiff has neglected and refused to fulfil his said contract as aforesaid, to the damage of these defendants one hundred and fifty dollars, which damages defendants set up by way of counter-claim, and demand judgment for $150, and costs; that plaintiff has neglected to comply with the terms of contract, though requested to do so by the defendants." The only witnesses who were sworn on the trial were the plaintiff and his son. The county court, on motion of the defendants, nonsuited the plaintiff, and from the judgment entered upon such nonsuit the plaintiff appeals to this court. * * *

To our minds the evidence tends strongly to show that the agreement was to work for four years upon the terms stated in the answer of the defendants; that the boy entered into the employ of the defendants under such agreement; and there is no sufficient evidence to sustain a finding as a question of law that such agreement was changed at the end of the first year, and that a new agreement was then made to work one year at five dollars per week. * * *

As there is no pretense that the contract of hiring for four years was in writing, it is clear that it was void under the statute of frauds. Section 2307, Rev. St., reads as follows: "In the following cases every agreement shall be void, unless such agreement, or some note or memorandum thereof expressing the consideration, be in writing and subscribed by the party charged therewith: (1) Every agreement that by

[75] Portions of the opinion are omitted.

its terms is not to be performed within one year from the making thereof."

The plaintiff having established the fact that his son had performed valuable services for the defendants, he was entitled to recover what such services were reasonably worth. There was evidence tending at least to show that such services were worth five dollars per week. This made out a case in favor of the plaintiff, and unless the fact that there was an unwritten agreement that his son should labor for the defendants for four years, and that his son quit the defendants' employment before that term had expired without just cause, was a defense to his action, he should have either had a verdict in his favor or the court should have submitted the question to the jury whether there was a new agreement made by the parties by which the son was to work for the defendants for one year at five dollars per week, without regard to the original agreement to work for four years.

The statute making the parol contract absolutely void furnishes no ground of action in favor of the plaintiff, nor can it be used by the defendants as a basis upon which to found a defense. The parties stand in the same relation to each other as though no express contract existed between them. This court long ago repudiated the rule laid down by some of the other courts in this country that although the contract is made void by statute, yet, if a party enters upon a performance of it, he cannot recover for the value of his labor done under it, unless he performs the whole of the void contract on his part. We are well satisfied with the reasons given by this court in the cases cited below for holding that a contract which is declared void by statute is no more a basis for a defense to an action than it is a basis upon which to found an action. See Brandeis v. Neustadtl, 13 Wis. 142;[76] Starin v. Newcomb, 13 Wis. 519; Thomas v. Sowards, 25 Wis. 631; Northwestern U. P. Co. v. Shaw, 37 Wis. 655, 19 Am. Rep. 781; Clark v. Davidson, 53 Wis. 317–322, 10 N. W. 384. In such case the parties must stand as though no express contract was made, and the plaintiff may recover upon a quantum meruit for the work done upon an implied promise of the defendants to pay what the services are reasonably worth. * * *

We think the county court erred in nonsuiting the plaintiff. The judgment of the circuit court is reversed, and the cause is remanded for a new trial.[77]

[76] This case contains an elaborate discussion of the difference between the English Statute of Frauds and the Wisconsin one.

[77] Accord: Scott v. Bush (1873) 26 Mich. 418, 12 Am. Rep. 311. (Money paid upon an oral contract to purchase land may be recovered, though defendant is ready and willing to convey the land.) Nelson v. Shelby Mfg. & Imp. Co. (1892) 96 Ala. 515, 11 South. 695, 38 Am. St. Rep. 116. (Same facts as in preceding case.) Koch v. Williams (1892) 82 Wis. 186, 52 N. W. 257. (Oral contract providing for performance of services by plaintiff to be compensated for by a conveyance of land by defendant; held, that after performance of such services by plaintiff he may recover the value thereof despite defendant's willingness to convey the land.)

SECTION 4.—REPUDIATION OR SUBSTANTIAL BREACH

I. By Defendant

TOWERS v. BARRETT.

(Court of King's Bench, 1786. 1 Term R. 133.)

Action for money had and received, and for money paid, laid out, and expended.

On the trial of this cause before Lord Mansfield, at the sittings at Westminster after last Michaelmas term, it appeared that this suit was instituted by the plaintiff to recover ten guineas, which he had paid to the defendant for a one-horse chaise and harness, on condition to be returned in case the plaintiff's wife should not approve of it, paying 3s. 6d. per diem for the hire of it. This contract was made by the defendant's servant, but his master did not object to it at the time. The plaintiff's wife not approving of the chaise, it was sent back at the expiration of three days, and left on defendant's premises, without any consent on his part to receive it: the hire of 3s. 6d. per diem was tendered at the same time, which the defendant refused, as well as to return the money.

After a verdict had been given for the plaintiff, Sir Thomas Davenport obtained a rule to shew cause why a non-suit should not be entered on the ground that this action for money had and received would not lie; but that it should have been on the special contract.

Lord Mansfield, C. J. I am a great friend to the action for money had and received; it is a very beneficial action, and founded on principles of eternal justice.

In support of that action, I said in the case of Weston v. Downes, [1 Doug. 23], that I would guard against all inconveniences which might arise from it, particularly a surprise on the defendant; as where the demand arises on a special contract, it should be put on the record. But I have gone farther than that; for if the parties come to trial on another ground, though there happen to be a general count for money had and received, I never suffer the defendant to be surprised by it, unless he has had notice from the plaintiff that he means to rely on that as well as the other ground.

But consistently with that guard, I do not think that the action can be too much encouraged. Here there is no pretence of a surprise on the defendant; there was no other question to be tried. The defendant knew the whole of the matter in dispute as well as the plaintiff. On what ground can it be said that this is not money paid to the plaintiff's use? The defendant has got his chaise again, and, notwithstanding that he keeps the money.

The case was well put by Mr. Justice Ashhurst in Weston v. Downes, and I think this is exactly like that. I was of opinion at the trial that this action would lie; and I still continue of that opinion.

ASHHURST, J.[78] * * * This is like the common cases where either party puts an end to a conditional agreement. Here the condition was to return the chaise if not approved of; therefore, the moment it was returned, the contract was at an end, and the defendant held the money against conscience and without consideration.

BULLER, J. On the very principle in Weston v. Downes, and Power v. Wells [Cowp. 818], which determined that the action for money had and received would not lie in those cases, it is clear that this action will lie.

It is admitted that if the defendant had actually accepted the chaise, the action would lie: but it has been contended that he did not receive it. Then let us see whether there be not something equivalent to an acceptance? I think there is, from the terms of the contract. There was nothing more to be done by the defendants; for he left it in the power of the plaintiff to put an end to the contract. Here it was not in his option to refuse the chaise when it was offered to him: he was bound to receive it; and therefore it is the same as if he had accepted it.

The distinction between those cases where the contract is open, and where it is not so, is this; if the contract be rescinded, either, as in this case, by the original terms of the contract, where no act remains to be done by the defendant himself, or by a subsequent assent by the defendant, the plaintiff is entitled to recover back his whole money; and then an action for money had and received will lie. But if the contract be open, the plaintiff's demand is not for the whole sum, but for damages arising out of that contract.

In a late case before me on a warranty of a pair of horses to Dr. Compton that they were five years old, when in fact they turned out to be only four, and they were not returned within a certain time, I held that if the plaintiff would rescind the contract entirely he must do it within a reasonable time, and that as he had not rescinded the contract, he could only recover damages; and then the question was, what was the difference of the value of horses of four or five years old?

So that the difference in cases of this kind is this; where the plaintiff is entitled to recover his whole money, he must shew that the contract is at an end: but if it continue open, he can only recover damages, and then he must state the special contract and the breach of it.

Rule discharged.[79]

[78] The concurring opinion of Willes, J., and a portion of the opinion of Ashhurst, J., are omitted.

[79] Accord: Gillet v. Maynard (1809) 5 Johns. 85, 4 Am. Dec. 329, where the court said: "The case of Towers v. Barrett, 1 Term Rep. 133, fully establishes the principle that assumpsit for money had and received lies to recover back money paid on a contract which is put an end to, either where, by the terms

SNOW v. PRESCOTT.

(Superior Court of Judicature of New Hampshire, 1842. 12 N. H. 535.)

Assumpsit, for goods sold and delivered, including, among other things, an anvil, the alleged price of which was $11; and a plough, the price of which was averred to be $3.50.

Upon the trial, it was proved that in the summer of the year 1838 the defendant was the holder of a promissory note against the plaintiff. There was evidence on the part of the plaintiff tending to show that he sold and delivered the plough and the anvil to the defendant, who agreed to indorse the price of them upon the note. The defendant afterwards brought an action, and recovered judgment on the note by default. The price of the articles was not indorsed upon the note, nor accounted for by the defendant, but execution issued for the judgment and costs, the amount of which the plaintiff afterwards paid the defendant.

The court instructed the jury, that if the plaintiff sold and delivered the articles to the defendant, who agreed to indorse their price upon the note, but omitted to do so, and the plaintiff paid the sum mentioned in the note, he was entitled to recover the price of the articles, in this action.

The jury returned a verdict for the plaintiff, which the defendant moved to set aside, on account of the instruction of the court.

GILCHRIST, J.[80] The case of Tilton v. Gordon, 1 N. H. 33, presents a state of facts similar to that in the case before us; and if the judgment there were correct, it should govern the decision of this case. The soundness of that judgment, however, has been often questioned at the bar, and by the court also, in the case of Fuller v. Little, 7 N. H. 535. It was pronounced by Mr. Justice Bell, and in the case of Farmer v. Stewart, 2 N. H. 101, was said by Mr. Justice Woodbury to be

of the contract, it is left in the plaintiff's power to rescind it, by any act, and he does it, or where the defendant afterwards assents to its being rescinded. I see no ground, therefore, upon which the defendant can resist a reimbursement of the sums he has received as a payment upon the contract which he has himself put an end to."

See, also, Earl of Lincoln v. Topcliff (1598) Cro. Eliz. 644, page 12, supra; Pierce v. Staub (1906) 78 Conn. 459, 62 Atl. 760, 30 L. R. A. (N. S.) 785, 112 Am. St. Rep. 163.

EXTENT OF BREACH BY DEFENDANT ENTITLING PLAINTIFF TO RESCIND.—The authorities are not fully agreed as to what conduct on the part of one party to a contract entitles the other party thereto to elect to treat the agreement as rescinded. An express mutual agreement to rescind is, of course, everywhere sufficient. Otherwise there must be, according to the English doctrine, such conduct on defendant's part as amounts to a repudiation of the contract; that is, either a refusal to perform, or an act rendering performance impossible. On the other hand, the prevailing American rule is that any breach on defendant's part which is so substantial as to constitute a defense to an action brought by the party in default for a refusal to proceed with the contract, justifies the plaintiff in rescinding the agreement. For a discussion of the two doctrines, with citations of the authorities, see Williston's Wald's Pollock on Contracts, pp. 334–342; Woodward, Quasi Contracts, § 263.

[80] Portions of the opinion are omitted.

"supported by principle as well as the authorities there collected." From the opinions of two so eminent lawyers, we should not hastily dissent, but a careful consideration of the case has led us to a different result.

In that case, Tilton delivered Gordon a yoke of oxen, in part payment of a note, and Gordon promised to indorse their price on the note. This he neglected to do, and brought an action on the note, in which he recovered judgment by default, for the sum for which the note was given. Tilton then brought an action to recover the price of the oxen, stating these facts in his declaration. The court held that if the action could be supported at all, it must be on the ground that Gordon recovered more than was due him in the action on the note; and that he could not recover on this ground, because a judgment recovered in a court of competent jurisdiction, while unreversed, is conclusive as to the subject matter of it, to every intent and purpose, and cannot be re-examined in a new action founded on evidence which would have constituted a defence to the original suit. The general principle thus enunciated by the court may be entirely correct, and it may be admitted to be in accordance with the authorities. Still, the question arises, whether the plaintiff, in order to make out his case, must necessarily have re-examined the merits of the original judgment. If this were unnecessary, the principle on which the judgment was rendered, although sound in the abstract, was incorrectly applied to the circumstances of the case. If the plaintiff could not have recovered without enquiring into the merits of the case, which had been settled by the judgment, then the decision was right, and the plaintiff in the action before us cannot recover. * * *

But the plaintiff might have been permitted to recover without a violation of any part of the doctrine of the court. The substance of his case was, that he had delivered the oxen to the defendant in part payment of the note; that the defendant agreed to indorse their price upon the note; that he failed to do so, and thereby did not receive them as payment, and that consequently he was then bound to pay him their price. In this view of the case, it was perfectly immaterial whether a judgment had or had not been rendered in a suit on the note. The plaintiff's cause of action, and right to recover the price, depended, not on the rendition of the judgment, but upon the breach of the defendant's contract. The note was accessible to the parties, as evidence of this collateral matter, even after the judgment; and, on being produced, an inspection of it would have shown that the defendant's contract had been broken. But no evidence need have been given of the judgment; and, not only would no enquiry have been necessary into its merits, but it would have been immaterial whether such a judgment existed. * * *

We have endeavored to explain the reasons why, in our opinion, the merits of the judgment upon the note were not involved in the suit to recover the price of the oxen. If these be sound, it will follow that

the ground on which the judgment was placed, was untenable. But there is another position, entitling the plaintiff to recover, which, perhaps, is but an extension of the views we have taken, and which is stated in the case of Fuller v. Little, 7 N. H. 535, by Mr. Justice Parker. It is substantially this: That a contract may be rescinded without proof of an express agreement to rescind it; that one of the parties may sometimes consider the act of the other as a rescission; and that when Gordon took his judgment for the sum mentioned in the note, without deduction, Tilton might elect to consider that as a rescission of the agreement to receive the oxen in part payment. Gordon would then have owed Tilton the price of the oxen, which might have been recovered without enquiring into the merits of the judgment. We are, therefore, of opinion that the principle stated by the court in Tilton v. Gordon, as the foundation of their judgment, was incorrectly applied to the facts of that case, and that the plaintiff was entitled to recover. Consequently, the plaintiff in this case is entitled to recover. He sold and delivered the plough and anvil to the defendant, who agreed to indorse their price upon the note. This agreement he failed to perform, and the plaintiff may consider this failure as a rescission of the agreement. The defendant, then, has received property of the plaintiff for which he has not paid. He cannot avail himself of his omission to make the indorsement, as a defence to this suit, and the plaintiff may now recover the price of the property, in this action.

Judgment on the verdict.[81]

MIZELL v. WATSON.

(Supreme Court of Florida, Division B, 1909. 57 Fla. 111, 49 South. 149.)

Error to Circuit Court, Jackson County; J. Emmet Wolfe, Judge.

Action by I. H. & W. L. Watson against C. F. & A. C. Mizell. Judgment for plaintiffs, and defendants bring error.

PARKHILL, J.[82] The defendants in error sued the plaintiffs in er-

[81] "In this case the plaintiff purchased of the defendant two plows; and in an adjustment of accounts between the parties the value of the plows was allowed to the defendant; yet he has refused to deliver the plows, and has converted them to his own use. It is objected, by the defendant, that this action cannot be maintained upon these facts. But we think otherwise. It seems to us, that when the defendant refused to deliver the plows, the plaintiff had a right to consider the contract as rescinded, and to recover back the price he had paid for the plows. 5 Johns. (N. Y.) 85, 4 Am. Dec. 329, Gillet v. Maynard; 12 Johns. (N. Y.) 274, 7 Am. Dec. 317, Raymond v. Bearnard. And it seems to us, that this plaintiff may recover upon his count, for money had and received, the price of the plows. It is not necessary, in order to support that count, that the defendant should have received money. It is enough, that he received money's worth. 2 N. H. 333, Willie v. Green." Danforth v. Dewey (1824) 3 N. H. 79.

[82] Portions of the opinion, stating the plaintiff's first and third counts (which were eliminated by the court), and discussing a point of pleading, are omitted.

ror in the circuit court for Jackson county, as set forth in the declaration as follows:

* * * * * * * * * * * *

"(2) Plaintiffs further sue the defendants for that whereas, the said defendants, by their agents, sold the plaintiffs a certain horse for a price and value of $180.00, and received as part payment on said horse $120.00 in cash, and at the time they so received said amount they represented to these plaintiffs that the said horse was sound physically and able to do the plaintiffs' work, when in truth and in fact the said horse was unsound and so afflicted and lame, and these defects could not then, at the time of the said transaction, be ascertained by the plaintiffs, and said horse was unfit for the plaintiffs' use and not serviceable, and the plaintiffs delivered said horse back to the said defendants, who accepted the same back, but the said defendants failed and refused to return to the plaintiffs the said $120.00 which they had obtained from the plaintiffs herein by reason of the agents' failure of warranty in said horse and by reason of its failure of guaranty of said horse. Wherefore the plaintiffs sustained a loss at the hands of the defendants in the sum of $120.00.

* * * * * * * * * * * *

"All of which amounts are long past due and unpaid. Wherefore plaintiffs sue and allege their damages in the sum of $500.00."

The defendants filed a plea of not guilty, upon which issue was joined. The jury rendered a verdict in favor of the plaintiffs for $121, upon which final judgment was rendered. The plaintiffs entered a remittitur for $1, and the defendants sued out a writ of error.

The court limited recovery to the second count of the declaration, in a charge to the jury as follows: "Now the court charges you that if the plaintiffs bought a horse from the defendants, and paid $120 in cash, and that at the time the trade was made the defendants or the defendants' authorized agents represented that the horse was physically sound and fit to do certain work, and that such representations were believed by plaintiffs, and induced the plaintiffs to purchase the horse and part with the money, and such representations were false and untrue, and the defendants or defendants' agents knew at the time they were false and untrue, and made them to induce the purchase of the horse, then the plaintiffs, upon the discovery of the defective condition of said horse, if any existed, would have a right to rescind the contract, provided they rescinded it in reasonable time, and demand back the money they, if any, had paid; and if you find from the evidence these were the facts, then the plaintiffs would be entitled to recover under the second count of the declaration, and the amount of money, if any, which they paid to defendants at the time they purchased the horse. That is practically all the law there is to this case."

The errors assigned complain of this instruction and the insufficiency of the evidence to support the verdict. * * *

It appears from the evidence that the plaintiffs, as one transaction,

bought of the defendants a horse and buggy, paying therefor the sum of $120 cash and giving their note and contract for $138, the balance due, as follows:

"$138.00. Chipley, Florida, March 13, 1907.

"On or before the first day of October, 1907, we promise to pay to C. F. & A. C. Mizell, or order, one hundred and thirty-eight dollars at their office in Chipley, Florida, for value received, with interest at 8 per cent. from date until paid, together with reasonable attorney's fees and all other expense incident to the collection of the same, whether by suit or otherwise, including recording fees.

"This note is given for the purchase price of one bay mare about 6 years old, also one J. G. Smith & Son top buggy, the title to which property shall remain in C. F. & A. C. Mizell until this note is fully paid, and said C. F. & A. C. Mizell may, either in person or by agent, at any time after default in payment, with or without legal process, retake said property wherever found, and any amount that may have been paid shall go as rent for its use."

The contract of purchase being entire, the plaintiffs could not rescind as to part and affirm as to the remainder. While they claim to have returned or offered to return the horse to the defendants, the evidence shows that the plaintiffs retained possession of the buggy, and never returned or offered to return it to the defendants in rescission of the contract; the buggy not being worthless. This being so, there was no rescission, and the plaintiffs could not recover the price paid while they retained a substantial portion of the property purchased by them. 24 Am. & Eng. Ency. Law (2d Ed.) 1110; Hancock v. Tucker, 8 Fla. 435; McCarthy v. Ellers, 107 App. Div. 219, 94 N. Y. Supp. 1109; Aultman v. McFallon (C. C.) 11 Fed. 836; Brockhaus v. Schilling, 52 Mo. App. 73.

The charge of the court, therefore, is erroneous, as being inapplicable to the evidence, and the verdict is not supported by the evidence. Whatever may have been the right of the plaintiffs to recover damages sustained because of the breach of warranty, they could not recover by way of rescission for a return of the price paid unless they placed the defendants in statu quo by a return of the horse and buggy. It is true the defendants took possession of the buggy after the plaintiffs had retained and used the same for seven months; but no contention is made that it was delivered or accepted in rescission of the contract. The buggy was retaken by the defendants after default in payment of the note, and "without the knowledge or consent of the plaintiffs," as is alleged in the third count of the declaration.

If there is to be another trial of this case, we deem it proper to say, in view of other phases of the evidence, if a vendee, upon the refusal of the vendor to accept his offer of return, when he has the right to rescind, takes the property and uses it as his own, he thereby loses such right. He cannot retain the property using it as his own, and at the same time rely upon a previous tender as a rescission. Moreover, any

unreasonable delay after the discovery of the facts giving rise to this right of rescission, or any action taken in continued recognition of the contract as a binding obligation, amounts to a ratification or election to abide by the contract, and bars a subsequent rescission. 24 Am. & Eng. Ency. (2d Ed.) 1111; 28 Am. & Eng. Ency. Law (1st Ed.) 822; Grymes v. Sanders, 93 U. S. 55, 23 L. Ed. 798; Logan v. Berkshire Apartment Ass'n, 3 Misc. Rep. 296, 22 N. Y. Supp. 776; McCulloch v. Scott, 13 B. Mon. (Ky.) 172, 56 Am. Dec. 561; Owens Co. v. Doughty, 16 N. D. 10, 110 N. W. 78; Hefner v. Robert, 76 Neb. 192, 107 N. W. 258; Palmer & Son v. Cowie, 27 Ohio Cir. Ct. R. 617.

Whether an offer to rescind a sale of chattels and return them to the seller was made within a reasonable time is, in general, a question of fact for the jury. Andrews v. Hensler, 6 Wall. 254, 18 L. Ed. 737; Barnett v. Stanton, 2 Ala. 195; Doane v. Dunham, 79 Ill. 131; Churchill v. Price, 44 Wis. 540. Where the facts are not disputed, however, the question of what is a reasonable time in which to rescind a contract is a question for the court to decide, and the time may be such that the court will declare it to be reasonable or unreasonable as a matter of law. Bacon v. Green, 36 Fla. 325, 18 South. 870; Johnson v. Whitman Agricultural Co., 20 Mo. App. 100; Woods v. Thompson, 114 Mo. App. 38, 88 S. W. 1126.

The judgment is reversed and a new trial ordered.

TAYLOR and HOCKER, JJ., concur. WHITFIELD, C. J., and SHACKLEFORD and COCKRELL, JJ., concur in the opinion.[83]

[83] Accord: Miner v. Bradley (1839) 22 Pick. (Mass.) 457; Clark v. Baker (1843) 5 Metc. (Mass.) 452; Fay v. Oliver (1848) 20 Vt. 118, 49 Am. Dec. 764; County of Jackson v. Hall (1870) 53 Ill. 440. See, also, Phelps v. Mineral Springs Heights Co. (1904) 123 Wis. 253, 101 N. W. 364.

In Miner v. Bradley, supra, the plaintiff had purchased from the defendant a cow and some hay for $17 which he paid at the time. He then received the cow and afterwards demanded the hay, which was refused by the defendant who had used it. Plaintiff, declaring for money had and received, and money paid, sued to recover the price paid for the hay. The court held that plaintiff had mistaken his remedy; Morton, J., saying: "When the defendant refused to deliver the hay, it was such a violation of the contract on his part, as would have justified the plaintiff in rescinding it. And, had he done so, he would have been entitled to a return of the money which he had paid. This, however, he could only do by restoring the defendant to the situation he was in before the contract, viz. by returning the cow. But if he chose to retain her, his only remedy would be upon the special contract for damages for the conversion of the hay. This would have been peculiarly adapted to his case, and would have done exact justice between the parties. The damage which the plaintiff sustained by the defendant's breach of his contract might be more or less than the value of the hay or the price which might be supposed to be paid for it; and he would recover according to the injury suffered by him. Again, as the cow and the hay were bought together for one gross sum, there are no means of ascertaining how much was intended for one and how much for the other. Indeed it is not probable that the parties fixed any definite price to the articles separately. If so, it might not have been the same; and as there was no interchange of opinions, there could not be that agreement of two minds which constitutes a contract. There being, therefore, no price agreed upon and paid for the hay, none could be recovered back. The value of the hay, which would be differently estimated by different individuals, certainly could not be deemed the measure of the price. In this action only the exact amount of the money paid can be recovered back. The

DE MONTAGUE v. BACHARACH.

(Supreme Judicial Court of Massachusetts, 1902. 181 Mass. 256, 63 N. E. 435.)

Exceptions from superior court, Suffolk county; John A. Aiken, Judge.

Contract upon an account annexed, by Albert F. De Montague against Solomon Bacharach and others. From a judgment for plaintiff, defendants bring exceptions.

LORING, J.[84] The defendants in this case were the lessees of a basement fitted up in part as a bar for the sale of liquor, and in part as a restaurant. In pursuance of an oral agreement between the plaintiff and the defendants, the plaintiff ran the restaurant for his own account from August 1, 1898, to July 1, 1899. There was a direct conflict in the evidence of the two as to the terms of the oral agreement, and also as to whether the plaintiff left voluntarily, or was put out by the defendants. Soon after he left, the plaintiff brought this action, in which he seeks to recover from the defendants all the sums paid by the plaintiff for the privilege of running the restaurant, for gas and electric light bills paid by him, and also for some work done at the defendants' request. These amounted to $1,528.22. The defendants declared against the plaintiff in set-off for the reasonable value of the use of the restaurant and the utensils belonging to them, and for gas and electric light bills incurred by the plaintiff, which they had to pay, amounting in all to $3,082.57. The case went to an auditor, whose report is not material. At the trial the plaintiff was given a verdict by the jury, and the case comes here on the defendants' exceptions.

The plaintiff's story was that he was to have the premises to the end of the defendants' lease, which had about two years to run on August 1, 1898, when the plaintiff was let into possession. The defendants testified that the original agreement was that the plaintiff was to have the restaurant until January 1, 1899, and that there was no agreement as to the duration of the arrangement after that date. The

plaintiff argues, that this contract may be severed, either with or without the consent of the parties, so that it may be enforced as to part and rejected as to another part. Here is nothing tending to show any agreement to divide the contract, as it applies to the two subjects. So far from it that the defendant denies that the hay ever was included in the contract."

But if the transaction consists of two or more distinct contracts, rescission of one of such contracts is permissible. Johnson v. Johnson (1802) 3 Bos. & Pul. 162, 127 Eng. Rep. 89. ("Although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts; and that the one part was sold for £300 and the other for £700.") Manning v. Humphreys (1854) 3 E. D. Smith (N. Y.) 218. ("Where different articles are sold at distinct prices, and one of them is not according to contract, it is not necessary to return the other articles, although purchased at the same time. The purchaser may return the defective article and recover the price paid therefor.")

[84] Portions of the opinion, holding that the statute of frauds did not apply, are omitted.

conflict between the plaintiff and the defendants was not confined to the time during which the arrangement was to last, but extended to nearly every particular of the arrangement, and there was evidence that the agreement was changed from time to time while it lasted. The jury were told that the first question for them to determine was what the agreement between the parties ultimately was, and the next question was, who ended the agreement? If the plaintiff ended it, he could recover nothing; but, if the defendants ended it, "the plaintiff is entitled to fair remuneration for the benefits that he conferred upon the defendants"; and in ascertaining the amount due, if anything is due the plaintiff, a balance must be struck, and, after ascertaining what remuneration is due the plaintiff for benefits conferred upon the defendants, there must be deducted therefrom the "benefits De Montague enjoyed in the way of what is spoken of as 'rent,' in the value of the enjoyment of the premises, and any other elements of benefit which appear in the papers and in the case that he had while he was in occupation, and you set the two classes of benefits one against the other."

The plaintiff contends that he can keep his verdict on either one of two grounds, namely: First, that the contract was within the statute of frauds, and, under the finding of the jury, was repudiated by the defendants; and, second, on the ground that he had a right to rescind the contract on the defendants' committing a breach of it. But we are of opinion that neither ground is tenable. * * *

The second ground on which the plaintiff seeks to keep his verdict is that, on the breach of the contract by the defendants, he was entitled to rescind the contract and recover from the defendants what he paid under it. But as was said in Handforth v. Jackson, 150 Mass. 149, 154, 22 N. E. 634, 635, in case a plaintiff wishes to rescind, the defendant is "entitled to have his property restored to him, not to have its value fixed by a jury"; and it is settled that a plaintiff cannot rescind a contract on the defendant committing a breach of it, without putting the defendant in statu quo. Leonard v. Morgan, 6 Gray, 412; Bassett v. Percival, 5 Allen, 345; Handforth v. Jackson, 150 Mass. 149, 22 N. E. 634; Marston v. Curtis, 163 Mass. 302, 39 N. E. 1113; Gassett v. Glazier, 165 Mass. 480, 43 N. E. 193. In the case at bar the plaintiff had enjoyed the privilege of conducting the restaurant for at least 10 months. For that reason he could not put the defendants in statu quo, and therefore could not rescind the contract on the defendants committing a breach of it. * * *

Exceptions sustained.[85]

[85] In Fay v. Oliver (1848) 20 Vt. 118, 49 Am. Dec. 764, plaintiff sued to recover the purchase money paid by him for land because of the defendant's refusal to convey a portion of it. The court denied relief; Royce, C. J., saying: "Here had been full payment made on one side, and full possession given on the other, with an actual conveyance of part of the land. The possession had been enjoyed by the plaintiff for several years, before he attempted any rescission of the contract. So that a part execution of the contract had

taken place, according to every rule on the subject, both at law and in equity. If the payment alone did not amount to this, the conveyance of part and such a change of possession as to all most assuredly did. And it is evident, that no subsequent rescission of the contract could restore the parties to their original condition, in reference to the property; for a long period of possession and enjoyment, inconsistent with such original condition, had already passed. And to prove that, in such a state of things, when the parties could not be placed in statu quo, it was too late for either, alone, to rescind the contract, the authorities are numerous and conclusive. The mention of a few will suffice. Hunt v. Silk, 5 East, 449; Beed v. Blandford, 2 Y. & J. 284; Seymour v. Bennet, 14 Mass. 266; Ellis v. Hoskins, 14 Johns. [N. Y.] 363; Caswell v. Black River Co., 14 Johns. [N. Y.] 453; Fuller v. Hubbard, 6 Cow. [N. Y.] 13 [16 Am. Dec. 423]; Gale v. Nixon, 6 Cow. [N. Y.] 445."

In Hunt v. Silk (1804) 5 East, 449, the defendant agreed, in consideration of £10., to let a house to the plaintiff, which the defendant was to repair and execute a lease of within ten days, but the plaintiff was to have immediate possession, and in consideration of the aforesaid was to execute a counterpart and pay the rent. The plaintiff took possession and paid £10. immediately, but the defendant neglected to execute the lease and make the repairs. Held, that the plaintiff could not, by quitting the house because of the default of the defendant, rescind the contract and recover back the £10. in an action for money had and received, but could only sue for a breach of the special contract; Lord Ellenborough, C. J., saying: "Now where a contract is to be rescinded at all, it must be rescinded in toto, and the parties put in statu quo. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account? This objection cannot be gotten rid of; the parties cannot be put in statu quo."

In this country it is often held that plaintiff's use of the property which is the subject-matter of the contract does not preclude the right to rescind. Nothe v. Nomer (1886) 54 Conn. 326, 8 Atl. 134 (land); Reynolds v. Lynch (1906) 98 Minn. 58, 107 N. W. 145 (option on land); Campbell Printing Press & Mfg. Co. v. Marsh (1894) 20 Colo. 22, 36 Pac. 799 (printing press). In the case last cited the court said: "It is urged that as the press has been put in use by the appellees, the appellant could not be placed in statu quo, and hence the former could not rescind. It is undoubtedly true that, where one of the parties to a contract seeks to rescind, he must place the other in statu quo. He will not be allowed to repudiate a contract and retain a benefit derived therefrom. In this case, however, it was in contemplation of the parties that the press should be used pending the delivery of the folder. The evidence shows that in fact it was used only to a very limited extent, that appellees had little or no benefit from such use, and that the press was returned in as good condition as when received. It is true that the witnesses testified that it would not sell so well as an unused press, but the rule requiring the seller to be placed in statu quo has never, we think, been extended so far as to entitle the parties in fault to be saved from all loss."

However, in Aultman & Taylor Co. v. Mead (1901) 109 Ky. 583, 60 S. W. 294, the court said by way of dictum that a purchaser of a sawmill could not, after three years' use, rescind the contract and recover the purchase price, since he could not have put the seller, in so far as the mill was concerned, in as good a situation as it (the seller) was before, "as three years' use of a sawmill of this character would very probably reduce its salable value."

TIMMERMAN v. STANLEY.

(Supreme Court of Georgia, 1905. 123 Ga. 850, 51 S. E. 760, 1 L. R. A. [N. S.] 379.)

Error from City Court of Macon; Robt. Hodges, Judge.

Timmerman brought suit against Stanley, alleging as follows: On July 29, 1903, the plaintiff bought of the defendant a scholarship in Stanley's Business College, in the city of Macon, in the telegraphic department, which embraced a course in learning telegraphy in said college. On August 12, 1903, he bought of the defendant a scholarship in the shorthand department in said college, which embraced a course in learning stenography, typewriting, etc. "The said scholarships were delivered to petitioner under the contract that a full course might be taken by him until he was proficient in said lines selected, without a limit of time." Stanley is the proprietor of the college, and the scholarships were sold by him to the plaintiff for the sum of $64. On August 2, 1904, the plaintiff was expelled by the defendant from the college for no fault or cause on his part. He had violated no rules of the college, nor had he been guilty of any conduct to authorize the expulsion. He had not completed the courses prescribed by the scholarships, and at the time of his expulsion was still pursuing his studies at the college. "Petitioner shows that said Stanley refuses to pay back to your petitioner the $64 paid for said scholarships, and to which your petitioner is entitled on account of said Stanley failing to carry out said agreement in said scholarships; and petitioner prays for a judgment against said Stanley for said sum." By the breach of the contract defendant has damaged plaintiff in the sum of $500. Plaintiff has paid out $300 for board and expenses in attending the school in order to qualify himself for business. By reason of the expulsion he cannot now finish his courses, so as to enter business, as other business colleges will not receive him after being expelled from this one. He is now at a monthly expense of $15, and will be so up to the time of the hearing of this action. "He prays for a judgment for said sum against the said Stanley." By reason of the breach of the contract defendant has delayed plaintiff in finishing his course so as to enter business for the current year, to his injury in the sum of $500. The defendant demurred to the declaration generally, and also specially. * * * The demurrer was sustained, and the plaintiff excepted.

LUMPKIN, J.[86] (after stating the facts). Assuming the allegations of the declaration to be true, as we must do in considering the demurrer, each of the contracts evidenced by the two scholarships was entire, and when the defendant repudiated them the plaintiff had the right to treat his action as rescission and bring suit for the amount which had been paid by him. Supreme Council v. Jordan, 117 Ga.

[86] Portions of the statement of facts and of the opinion, involving a point of pleading, are omitted.

808, 45 S. E. 33. Or he might sue for a breach of the contract. Alabama Gold Ins. Co. v. Garmany, 74 Ga. 51. In the latter event, that decision holds that in some cases the amount paid by the plaintiff may be considered in fixing the amount of the damages. In 8 Am. & Eng. Enc. Law (2d Ed.) 632, it is said: "As has been said more than once, the fundamental principle of damages is compensation to the injured party. This rule in the present connection is simply the application of the principle stated to contracts; that is, the measure of damages in such cases is the value of the bargain to the complaining party, or the loss which a fulfillment of the contract would have prevented or the breach of it has entailed. Or, as it has been said, the general intent of the law, which gives damages in actions for breach of contract, is to put the injured party, so far as it can be done by money, in the same position as if the contract had been performed. According to this principle, the measure of damages for breach of a contract is not, as a general rule, the consideration paid, but rather the value of the thing contracted for, unless, indeed, the plaintiff has, under the circumstances, a right to disaffirm the contract, and sue to recover the consideration paid." The plaintiff cannot in the same action both treat the contract as rescinded and rely on it. Harden v. Lang, 110 Ga. 392, 36 S. E. 100.

It is not quite easy to determine whether this action is one for breach of the contract, or one for the recovery of the purchase price of the scholarships based on the idea of a rescission, coupled with an effort to sue for the breach of the contract in the same action. It has been held that suit to recover the purchase price is equivalent to an express disaffirmance, and that after such disaffirmance there cannot be a proceeding to enforce the contract, either by an equitable proceeding to compel specific performance or by an action for damages. 24 Am. & Eng. Enc. Law (2d Ed.) 645, note 5. The plaintiff alleged that the defendant refused to pay back to him the $64 paid for the scholarships, to which the plaintiff is entitled; and he prays for a judgment for that specific sum, not as damages, or as a part of his damages, or as throwing light on the amount of damages, but as a return of the purchase money. Taking the pleadings most strongly against the pleader, the statement that the defendant refuses to pay back the amount to him implied that a demand had been made. We are of the opinion, therefore, that this part of the declaration treats the contract as at an end, and seeks to recover the amount paid by the plaintiff to the defendant under it. Such being the case, the particular portion of the declaration which sues for the recovery of such amount is not subject to demurrer on the ground urged against it.

It is contended, in the brief of counsel for the defendant in error, that there can be no recovery of the amount paid, because, in order to rescind the contract, the plaintiff must restore the status quo, and must tender back to the defendant what he has received from him, and that this cannot be done in the present case. Civ. Code 1895, §

3712. This is a general rule where one party to the contract has received goods, money, or other thing of value, which is capable of being returned to the other party. But in a contract like that involved in the present case, where a person agrees to teach another a certain thing, or to qualify him for a certain position, if he gives the student some instruction and then refuses to complete his contract, there would be no possible way by which such instruction as he had given could be returned or tendered back to him; nor is the other party required to estimate value for what has been done and tender such amount. He cannot hold onto the amount paid, refuse to proceed with the contract, and defend against an action to recover the price paid on the ground that the plaintiff had not tendered back to him his instruction, and could not restore him to the status quo. He cannot by his own conduct place himself in a situation where restoration is impossible, repudiate the contract, and set up this situation as a defense to a suit for the amount paid. If he abandons the contract, he should not complain that the other party is willing to treat it as rescinded. The Code section cited has no application in such a case. Henderson Warehouse Co. v. Brand, 105 Ga. 217, 224, 31 S. E. 551. The cases of Alabama Gold Life Ins. Co. v. Garmany, and Supreme Council v. Jordan, supra, are also in point as to this contention. * * *

From what has been said it is evident that the claim for expenses in attending school, expenses pending the suit, and delay in being prepared for business cannot be joined with the action for the return of the purchase price, based upon a rescission of the contract. Moreover, the allegations of the declaration with respect to those items are quite vague and general, and a part of the damages would not be recoverable, even in an action based on a breach of the contract. The dismissal of the entire case was erroneous. The claim to recover the items of damage just referred to should have been stricken, and the case left to stand on the suit for the return of the price paid for the scholarships. * * *

Judgment reversed, with directions.[87]

[87] In Brown v. Woodbury (1903) 183 Mass. 279, 67 N. E. 327, the defendants agreed to employ the plaintiff to act as manager of a hotel for a year, the plaintiff to be paid a certain percentage of the net proceeds, and plaintiff's father and mother to have board and rooms at the hotel without charge during the year. After partial performance the defendant discharged the plaintiff. It was held that the fact that the plaintiff had received the benefit of the board and lodging of his father and mother during that time did not prevent him from rescinding the contract and suing the defendant on a quantum meruit for the value of his services in excess of such board and lodging; Hammond, J., saying, "The defendants further contend that the plaintiff, having received the benefit of the board of his father and mother several months, cannot now avail himself of this rule. But this board was in part payment of the work done by the plaintiff, and whether the action be upon the contract or upon quantum meruit, the plaintiff is equally entitled to it. Part payment in money would not bar the plaintiff from the action on quantum meruit (Cook v. Gray and Connolly v. Sullivan, ubi supra), and in principle part payment in board can have no different effect. In the opinion of a majority of the court the rulings were right."

AMERICAN LIFE INS. CO. v. McADEN.

(Supreme Court of Pennsylvania, 1885. 109 Pa. 399, 1 Atl. 256.)

Error to court of common pleas No. 3, Philadelphia county.

This was an action of assumpsit to recover premiums paid upon a policy of insurance. The jury rendered a verdict for the plaintiff, whereupon this writ was taken.

CLARK, J.[88] The evidence shows that in May, 1869, a policy of life insurance was issued by the defendant, the American Life Insurance Company, to the plaintiff Mary F. McAden, in the sum of $20,000, upon the life of her husband, Rufus Y. McAden, of Charlotte, North Carolina; that the plaintiff paid premiums on this policy, in quarterly payments of $104.44 each, from its date until in August, 1879, when the company refused to accept the premium then tendered, declaring that the policy, by its terms, had become forfeit to the company; the premium mentioned not having been paid or tendered within the time stipulated, but one or two days later. This action of assumpsit was thereupon brought, not upon the contract contained in the policy, but as upon a rescission of it, to recover the premiums paid, upon a count for money had and received by the defendant to the use of the plaintiff.

The policy was produced at the trial, and the plaintiffs offered to read it in evidence, but, upon the objection of the defendant's counsel that it was an instrument under seal, and the action assumpsit, the court excluded it. This ruling of the court was, we think, erroneous, but the defendant cannot complain, as it was made at his instance. The action, it is plain, is not founded on the policy; for if the policy be in force, there can, in the nature of the case, be no recovery upon the count for money had and received. The suit is in direct disaffirmance of the contract, and cannot therefore be said to be founded upon it.[89]

Assumpsit for money had and received is frequently brought to recover back a deposit or money paid upon an agreement which the defendant omits or refuses to perform; and on a single count in the common form, various sums, received at different times, may be recovered. 1 Chit. Pl. 353, 356. When, for example, a person purchases land, and pays part of the purchase money, and the seller does not, and will not, complete the engagement, so that the contract is totally unexecuted, he, the purchaser, may either affirm the agreement by bringing an action for non-performance of it, or he may elect to disaffirm it ab initio, and bring an action for money had and received to his use. 1 Sugd. Vend.

[88] The statement of facts is omitted.

[89] By the weight of authority it is immaterial that the contract was under seal. Weaver v. Bentley (1803) 1 Caines (N. Y.) 47; Ballou v. Billings (1884) 136 Mass. 307.

Contra: Western v. Sharp (1853) 14 B. Mon. (53 Ky.) 177.

Or, where two persons enter into a contract for services, and, after part performance by one, the other denies its existence, and gives notice of his intention to disregard it, the party not in default may, at his option, perform fully, and enforce the contract, or consider it at an end, and recover for part performance upon a quantum meruit. Moorhead v. Fry, 24 Pa. 37. In Feay v. Decamp, 15 Serg. & R. 227, there was an agreement, under seal for the sale of land, with possession delivered, and a large part of the money paid, but not to the extent the contract required. The owner resumed the possession, and declared the contract at an end. Held to be a disaffirmance, and that the vendee might, in an action of assumpsit, recover back the money paid on account for money had and received.

The doctrine as to the distinction to be drawn between a suit on the contract and a suit grounded upon a rescission of it is thus plainly stated in Smethurst v. Woolston, 5 Watts & S. 109: "But this distinction, which pervades all the authorities, governs the whole case; for the purchaser may declare specially for the breach of the contract, or simply for money had and received, to recover back the deposit, if any be made, or the purchase money, if it be paid; or he may join both causes of action in the same declaration. And when this is done, it is granted that under the money count the money advanced may be recovered back, or, where a specific article has been given in satisfaction, the purchaser may, when default is made, elect to consider the contract at an end, and recover the article itself, or its value, from the vendor. But, on the other hand, where the purchaser declares specially for breach of the contract, and thereby affirms it, the only rule of damages is the value of the article at or about the time it is to be delivered." The same principle is applied in Wilkinson v. Ferree, 24 Pa. 190, and Miller v. Phillips, 31 Pa. 218.

In all such cases the contract, although under seal, is rightly received in evidence to exhibit the transaction as it previously existed, to determine the resulting rights of the parties, and, in some cases, perhaps, to aid in the assessment of the damages. Mehaffy v. Share, 2 Pen. & W. 361; Carrier v. Dilworth, 59 Pa. 406. If, however, the contract has been in part performed, the plaintiff having received some substantial benefit therefrom, and if, upon a verdict in his favor, the parties cannot be placed in statu quo, the count for money had and received in general is not maintainable. Chit. Pl. 355. The plaintiff must show that he has equity and good conscience on his side or he cannot recover.

In the case at bar the rights of the parties under the contract of insurance had attached, but the plaintiffs had never received any actual benefit from it. They may, in some sense, perhaps, be said to have enjoyed the protection which the policy afforded in the event of the husband's death; but as that event did not occur, the policy had as yet been of no appreciable actual advantage to the plaintiff, and no real disadvantage to the defendant. The parties, for anything that

appears, upon the plaintiffs' recovery are placed precisely in the same situation they were in before the contract was made; for, although the company carried the risk, and the plaintiff Mary F. McAden, at all times during the continuance of the contract upon the happening of the event provided against was entitled to the indemnity it secured, yet the company has paid nothing and the plaintiffs have received nothing. As in the case of any other contract, the parties were each entitled during its continuance according to its terms.

The policy when made was admittedly valid; the premiums which were paid were voluntarily paid upon that policy; the risk had been running for 10 years; the obligations of the contract were long since in force on both sides; and it is clear that the plaintiffs could not, on their own mere motion, rescind it so as to recover back the premiums paid. But if, after receiving these several premiums, the company, without right, refuse to receive further premiums as they mature, deny their obligation, and declare the contract at an end, the plaintiff, we think, may take the defendants at their word, treat the contract as rescinded, and recover back the premiums paid as so much money had and received for their use. Rescission or avoidance, properly so called, annihilates the contract and puts the parties in the same position as if it had never existed. And notice that a party will not perform his contract has the same effect as a breach. Ballou v. Billings, 136 Mass. 309. It is of no consequence that the payment of the premiums was voluntary upon a valid obligation of the plaintiff to discharge a debt which the plaintiff owed, and which the defendant had a right to receive. The action is not founded in any fraud or failure in the original contract, but on a rescission of it through the subsequent refusal of the defendant to perform it. It is clearly shown, indeed it is admitted, that the premium due in August, 1879, was tendered to the company, and was refused upon the ground that the company was not then bound to receive it, and that the policy, according to some alleged express stipulation it contained respecting the payment of the premiums, was forfeited and void. The president of the company denied all liability on the policy, and declared the contract at an end. If the reasons assigned by the president were valid and true, the refusal to receive the premium was right; if the contract was in fact forfeited and void, there was no contract remaining to rescind; and if there was no rescission, there could be no recovery for money had and received. But there was no proof whatever of a forfeiture of the policy. It was alleged that the contract contained a clause, according to which, by reason of the non-payment of the premium due in August, 1879, on or before the exact day designated for payment thereof, a forfeiture ensued. Whether this was so or not depended, in the first instance at least, upon the proper reading and construction of the policy itself, which the defendant would not allow the plaintiffs to offer in evidence, nor would they offer it themselves.

The policy is therefore not before us; we do not know what it provides; if it contains any such clause, it should have been given in evidence. As the case is now presented to us, the company would appear to have declared the lapse of the policy, without any warrant whatever, and without cause, and if the defendants received the plaintiffs' money, and under such circumstances, upon demand, refused to return it, we think it may be recovered back in an action of assumpsit. May, Ins. 429; Seipel v. International Ins. Co., 84 Pa. 47.

The case of McKee v. Phœnix Ins. Co., 28 Mo. 383, 75 Am. Dec. 129, is, in all respects, similar in principle to the case under consideration. There a wife insured the life of her husband, and, after making several payments, obtained a divorce. Other payments were afterwards made, when the insurer refused to receive a semi-annual installment tendered when due. In an action for money had and received, it was held that the decree of divorce did not authorize a forfeiture of the policy, and that "if the defendant wrongfully determined the contract by refusing to receive a premium when it was due, then the plaintiff had a right to treat the policy as at an end, and to recover all the money she had paid under it."

In some cases, perhaps, the defendant ought to refund the principal merely, and in others he ought, ex æquo et bono, to refund the principal, with interest. Each case depends upon the justice and equity arising out of its peculiar circumstances. In this case, however, interest was allowed from the date of the demand only, and certainly the defendant cannot complain of that. The judgment is affirmed.

TRUNKEY, J., dissents.[90]

[90] Accord: Black v. Supreme Council American Legion of Honor (C. C. 1903) 120 Fed. 580.

Contra: Continental Life Insurance Co. v. Houser (1883) 89 Ind. 258, where the court said: "The policy was valid in its inception, and there was for a time a risk, and the general rule is that where the risk attaches premiums cannot be recovered from the company. Bliss, Life Ins. 750; May, Ins. § 567. If there was a continuing of the valid risk up to the time the last premium was tendered and refused, then the premiums previously paid cannot be recovered. May, Ins. §§ 568 and 569. If, however, the act of the appellant in declaring a forfeiture was wrongful, then there must be a remedy. We do not feel called upon to decide whether the remedy would be a reinstatement of the policy, or an action for its value, for the complaint is insufficient in any view that may be taken of the question."

See, also, Johnson v. Insurance Co. (1894) 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473, where it was held that, in an action by an infant in disaffirmance of a contract of insurance and to recover the premiums paid, the insurance company could recoup the equitable value of the insurance received by him up to the time of disaffirmance.

Where an insurance company wishes to rescind a policy, it must return the premiums already paid. Metropolitan Life Insurance Co. v. Freedman (1909) 159 Mich. 114, 123 N. W. 547, 32 L. R. A. (N. S.) 298.

TODD v. LEACH.

(Supreme Court of Georgia, 1897. 100 Ga. 227, 28 S. E. 43.)

Error from City Court of Atlanta; J. D. Berry, Judge.

LUMPKIN, P. J. An action was brought by Leach against Abram and Jane Todd. The declaration made, in substance, the following case: Under a contract with the defendants, the plaintiff, at an expense of $200, built a house upon a lot which they owned in the city of Atlanta, the consideration of his so doing being that he was to have the use and occupation of the same for the balance of his life, free of rent. He went into possession. Afterwards, in violation of their contract, the defendants wrongfully evicted him from the premises. The prayer of the petition was for the recovery of the money he had expended, and the value of the labor he had performed, in the erection of the house; the same amounting altogether, as alleged, to $200. The action was in no sense one to recover the value of the life term of which the plaintiff claimed he had been unlawfully deprived. The defendants sought to set off against the plaintiff's claim the value of the premises for rent during the time the same had been occupied by him. The court, by its charge, completely eliminated this defense from consideration by the jury, and its so doing is assigned as error in the bill of exceptions.

1. Undoubtedly, by bringing the above-described action, the plaintiff elected to treat the original contract between himself and the defendants as rescinded. This being so, it follows as a necessary legal consequence that the defendants were entitled to plead and prove the alleged set-off. "Where the plaintiff seeks to recover the purchase money paid by him for land, treating the contract of sale as rescinded, he must account for the value of the use thereof whilst he was in possession." McDonald v. Beall, 55 Ga. 288. And see Wilson v. Burks, 71 Ga. 862. The case in hand is controlled by the principle laid down in the cases just cited, and there would be no difficulty in fortifying their correctness by authorities ad nauseam.

2. The statute of frauds manifestly has no bearing upon the present case. Judgment reversed.[91]

[91] In Ankeny v. Clark (1892) 148 U. S. 345, 359, 13 Sup. Ct. 617, 37 L. Ed. 475, a contract entered into by defendant to convey to plaintiff two quarter sections of land in exchange for 12,000 bushels of wheat was repudiated by the defendant after delivery to him of the wheat. Plaintiff brought assumpsit for the value of the wheat, and defendant contended (inter alia) that plaintiff should be charged and defendant credited with the rental value of the land during the period that plaintiff was in possession. The court held that "the plaintiff was not in possession as a tenant, or under any agreement to pay rent; nor does the law, under the circumstances of the case, raise any obligation to pay rent."

In Kicks v. State Bank of Lisbon (1904) 12 N. D. 576, 98 N. W. 408, the court said: "The object to be sought by the judgment in the case is to place the parties, as nearly as possible, in statu quo. If no possession is gained under the contract, and money has been paid, the general rule of damages in this class of action is the money paid with interest. If possession be taken

WILKINSON v. FERREE.

(Supreme Court of Pennsylvania, 1855. 24 Pa. 190.)

Error to the District Court, Philadelphia.

George Ferree brought suit to recover $300 and interest, for rent claimed as due him by Wilkinson. The latter claimed a set off, to the amount of $250, being one-half the sum at which Ferree had sold to him the fixtures and the good-will of a store. These had been sold for $500, which Wilkinson had paid. On his part testimony was offered to show that the title of Ferree to one-half of the fixtures had failed. On Ferree's part witnesses were examined, who testified that the fixtures were in fact worth only from $15 to $25.

The judge below instructed the jury that, if they found that the title to the part of the fixtures had failed, then they should allow as an offset against Ferree's claim the real value of the articles as fixed by the testimony, and not the price paid by Wilkinson to Ferree; that the price so paid was not conclusive. To this instruction exception was taken: and it was assigned for error.

The jury found for plaintiff $300, allowing but $18 for the fixtures.

BLACK, J. One of these parties sold the other certain fixtures in a store for a price much beyond their real value. The vendor had no title whatever to the things sold, and the vendee seeks to be indemnified for his loss. The question is, whether he can recover back the sum which he paid for the fixtures, or whether his measure of damages must be restricted to their actual value.

When suit is brought on a contract and in affirmance of it, the verdict should make the plaintiff whole; that is, put him in as good a condition as if the contract had been performed. He cannot swell his damages by proving that the bargain he sues on was a bad one. When he deals in morus multicaulis trees, as in Smethurst v. Woolston, 5 Watts & S. 109, and takes the guarantee of a third person for their delivery at a subsequent day, and the price falls in the mean time, he can recover for a breach of the guarantee no more than the value of

by the vendee under the contract, and such possession be a benefit, some cases allow the benefit of such possession to be counterclaimed as against the money paid. Todd v. McLaughlin, 125 Mich. 268, 84 N. W. 146; Baston v. Clifford, 68 Ill. 67, 18 Am. Rep. 547. The general rule, however, is that interest on the purchase money paid and the use of the land under the contract shall offset each other. In case the whole purchase price is paid when possession is taken, this rule does justice between the parties while possession continues. * * * In this case the whole of the purchase price of the land was not paid by the vendee, and hence the rule that interest on the purchase price shall balance the value of the use of the land does not fully compensate the defendant for the use of his land. But the plaintiff, while breaking and preparing the land for crops, received no benefit from the land as a matter of fact. She did not receive the full beneficial use of the land as a residence during any of the time. To allow her the use of the land, and the defendant the use of the money without interest, is as practical and just an adjustment of the mutual rights of the parties as can be made under the evidence submitted in the case."

the trees when they should have been delivered; for the guarantor bound himself to indemnify the purchaser only against a violation of the contract, and not to save him harmless from the consequences of an absurd speculation. So on a contract to deliver wheat at a future time, the measure of damages for its violation by the vendor is the price of the wheat, or its value to the vendee, not at the date of the contract, but at the time fixed for delivery. If the market rises the vendee has the benefit of it, and if it sinks, he must take the loss. 1 Dyer, 82. When the quality of an article is warranted by the seller, and turns out to be inferior, the purchaser may demand the difference between the value of the article as it is, and as it was warranted to be. Cary v. Gruman, 4 Hill [N. Y.] 625, 40 Am. Dec. 299. The vendor of a lame horse warrants him sound. In an action on the warranty the inquiry is, what was the actual value of such a horse supposing him sound, and how much is that value diminished by the defect? The vendor is entitled to the price because he bargained for it fairly, and the vendee is entitled to a sound horse, or its full equivalent, for the same reason. The consideration upon which the warranty is based may be more or less than what a sharp trader would agree to take, but this neither increases nor diminishes the obligation to make the warranty good. In either case the vendee is entitled to as much money as, when added to a lame horse, will equal the actual value of a sound one.

But all these rules apply only to cases where the suit is brought on the contract. When the party injured has a right to treat it as rescinded and sue in disaffirmance of it, he may recover back his purchase-money, or so much of it as he has paid. This distinction is not only recognized, but strongly laid down, and earnestly insisted on in Smethurst v. Woolston, and it is so obviously well founded in reason that it needs no illustration. It is not necessary now to classify or enumerate the cases in which a purchaser may elect to sue on the contract, or to disaffirm it by an action for the purchase-money. But the plainest of all cases for the rescission of a contract, is the sale of an article which the vendor did not own, and had no right to sell. When the purchase-money paid on such a contract is demanded back the vendor cannot say to the injured party, "It is true I sold you what was not mine to sell, but I sold it at a price twenty-fold greater than it was worth, and I claim to keep the difference as a reward for my ingenuity." In Charnley v. Dulles, 8 Watts & S. 361, it is broadly held that the purchaser of a chattel who gets no title may recover back his money without proving either fraud or express warranty. This of course is to be understood as of a case in which the suit is in disaffirmance of the contract. In the present case the claim was made by way of set-off, and there is nothing on the record which shows the defendant to have made an election to stand upon the contract. In the absence of evidence to the contrary, we must presume that he has chosen to do what is most consistent with his interests, and with the

demand he makes against the plaintiff, namely, to rescind the contract. Having done this, he has a right to the purchase-money without reference to the value of the articles which he once agreed to take in place of it.

It is proper to add that what I have said is based on that state of the facts which the bill of exceptions presents. I do not mean to say what the verdict ought to be, but merely that the judge misinstructed the jury, when he confined them to the value of the articles, in estimating what the defendant should be allowed for the fixtures which he alleges that he bought, but never got.

Judgment reversed and venire facias de novo awarded.[92]

CLARK v. MANCHESTER.

(Supreme Court of New Hampshire, 1872. 51 N. H. 594.)

Assumpsit by Geo. W. Clark against Manchester, upon the common counts, and a quantum meruit for work and labor. The plaintiff's claim was to recover for services as a laborer on the city farm, from April 13, 1870, to October 23 of the same year, by the employment of Joseph Cross, the defendants' agent. The evidence tended to show an employment for a year for $300, or $25 per month. It appeared that the plaintiff had drawn his pay monthly, at the rate of $25 per month, from the city treasury, excepting $23.08 due on the last month, which has been ready for him there ever since he left the defendants' employ, but which he declined to receive because he has claimed that he was entitled to more. The plaintiff left the defendants' employ October 23, 1870; and it was a question in dispute whether he left voluntarily, or was discharged without sufficient cause. The court instructed the jury that if they found the hiring to be for a year from April 13, whether the terms of the contract were $25 per month or $300 per year, and that the plaintiff was discharged Oct. 23, without sufficient cause, he would be entitled to recover so much as his services were reasonably worth during the whole period he worked, deducting what he had received, and also deducting the $23.08, in case they were of opinion that it was the understanding that the plaintiff should go to the city treasury and there draw his pay. To this instruction the defendants excepted, on the ground that all claims were settled and discharged by payment and acceptance of pay by the plaintiff, at the rate of $25 per month, up to about October 1; that in no event could the plaintiff be entitled to recover on a quantum meruit for more than the last month's work.

The verdict was for the plaintiff for $109.33, which includes the

[92] Accord: Nash v. Towne (1866) 5 Wall. 689, 18 L. Ed. 527.
Contra: Dutch v. Warren (K. B. 1720) 2 Burr. 1010. (Stated by Lord Mansfield in Moses v. Macferlan, at page 20, supra.)

$23.08, the jury being of opinion that it was not part of the contract that the plaintiff should draw his pay at the city treasury.

The case was reserved.

SARGENT, J. The jury have found, upon the instructions given them, that the contract was to work for a year for $300, or at the rate of $25 per month for the whole year, and that the plaintiff received his $25 per month up to October, and was turned away, without sufficient cause, at that time. In other words, the city broke or rescinded its contract with the plaintiff at the end of about six months, and after the plaintiff had worked through the very best of the season. He had worked during those months when he could have earned $30 or $35 per month, whereas for the balance of the year he might not be able to earn more than $15 or $20 per month.

If he had continued the year out, and had gone every month and received his $25, that would have completed the contract on both sides, and that sum, by the month for the whole year, would have been payment in full for his services; yet, when the defendants rescind the contract in the midst of the term, without sufficient cause, they cannot claim that the payments which have been made, though at the rate per month stipulated for the whole time, shall be received in full for the services rendered, if those services were worth much more for that time than the average for the year.

The contract is to be construed as a whole. It is not $25 per month for a single month, or for each separate month, or for any number of months less than the year. The contract being entire, the defendants cannot break one part of it and still insist upon the performance of the other part. When the defendants rescinded the contract, they put it out of their power to enforce it upon the other party, but the other party may consider it as rescinded and claim pay just as though it had never existed, which will be just what he is claiming here, namely, to recover what his services were worth for the time he labored.

The error of the defendants' counsel in their brief is in assuming that here was payment made by the defendants and received by the plaintiff in full for the services of each month. The defendants cannot hold the plaintiff to the agreed price per month only in connection with the other part of the contract, viz., that the employment should continue at the same rate for the whole year. Where one party to a special contract, which is executory, refuses to execute any substantial part of his agreement, the other party may rescind, if he do so unequivocally and in reasonable time. Webb v. Stone, 24 N. H. 288; Allen v. Webb, 24 N. H. 278; Weeks v. Robie, 42 N. H. 316, and cases cited; Danforth v. Dewey, 3 N. H. 79; Judge of Probate v. Stone, 44 N. H. 593.

This contract was executory, in that it was to be continued for a year; and when the defendants broke it in this respect, they cannot hold the plaintiff bound by the other provisions of it. The plaintiff had the right to rescind the whole contract, and sue in indebitatus as-

sumpsit to receive back a consideration paid, or on a quantum meruit to recover what his services were worth. This is the same form of action as in Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713.

Judgment on the verdict.[93]

DAVIDSON v. LAUGHLIN.

(Supreme Court of California, 1903. 138 Cal. 320, 71 Pac. 345, 5 L. R. A. [N. S.] 579.)

Appeal from superior court, Los Angeles county; J. W. Mahon, Judge.

McFARLAND, J.[94] This is an appeal by defendant from a judgment in favor of plaintiff and from an order denying a motion for a new trial. The action is for the recovery of the reasonable value of certain services rendered by plaintiff to defendant. These facts were averred in the complaint and found by the court: Plaintiff was in the employment of defendant from the 1st day of October, 1896, to the 25th day of July, 1898; but for services rendered prior to May 1, 1897, plaintiff was paid, and they form no part of the matters here in litigation. As to what plaintiff was to receive for his services after May 1, 1897, there was no express agreement between the parties until June 20th of that year. Defendant was then engaged in the erection of a six-story building, and it was in connection with this building, and some other matters, that plaintiff was employed. The parties, on said

[93] In Clark v. Mayor of New York (1850) 4 N. Y. 339, 53 Am. Dec. 379, the plaintiff, a contractor, agreed to excavate rock in a certain section of the Croton Aqueduct at the rate of one dollar per cubic yard. After part performance by plaintiff, the defendant arbitrarily annulled the contract. Plaintiff had completed the most difficult portion of the work, part of the excavating done by him being worth $4.20 per cubic yard and part worth $1.20, while the excavating not yet completed would cost only about thirty-five cents per cubic yard. Held that in an action for work and labor plaintiff could recover what the work done was actually worth.

In Wellston Coal Co. v. Franklin Paper Co. (1897) 57 Ohio St. 182, 48 N. E. 888, in order to obtain a permanent market for his coal for a certain time, plaintiff had contracted in writing to deliver to defendant and defendant had agreed to take all the coal the latter might need in its business for the period of one year at a fixed price per ton. As was known to both parties, the market price of coal varied with the season, being higher in the fall and winter months than during the rest of the year. Plaintiff furnished coal to defendant during the fall and winter and was paid therefor under the contract, the contract rate being less than the market price of coal at that time. In the spring the defendant wrongfully terminated the contract and refused to receive any more coal, the contract and the market price being then about the same. Held, that the plaintiff might waive the contract and recover on a quantum meruit the amount by which the market price of the coal delivered exceeded the contract price; the court saying, "In the case before us justice and fair dealing require that the defendant, having repudiated the contract, should pay the market price for the coal at the time it was delivered."

See, also, in accord, McQueen v. Gamble (1876) 33 Mich. 344; Caldwell v. Myers (1892) 2 S. D. 506, 51 N. W. 210.

[94] A portion of the opinion, discussing the admissibility of certain evidence, is omitted.

June 20th, had a conference about what plaintiff's compensation should be during the progress of the construction of the building, which resulted in a contract that when the building should be completed and the tenants should commence to pay rent, plaintiff should be permanently employed by defendant as his agent in the management of the building, "keeping the same rented, and collecting the rents, and attending to the repairs and all other useful services in the proper management of the said building," and that defendant would pay for his services as such agent $150 per month; and plaintiff, in consideration that he be so employed as agent after the completion of the building, and paid said compensation, agreed that he would take for his services from May 1, 1897, to the time of the completion of the building, $60 per month. The building was completed and tenants commenced to pay rent on July 12, 1898; but on July 25th,—13 days later,—"without any reasonable or lawful cause or excuse whatever, the defendant discharged plaintiff from his employment," and has ever since refused to allow him to perform any services as such agent, or to pay him therefor. The reasonable value of the plaintiff's services from May 1, 1897, to the time of his discharge on July 25, 1898, was $150 per month, amounting to $2,225. Of this amount $500 had been paid, and the court rendered judgment for the balance.

The main contention of appellant is that the findings of the court of the foregoing facts are not sustained by the evidence; but this contention cannot be maintained. There was a conflict of evidence as to what the contract between the parties was, and as to the reasonable value of respondent's services, etc.; but there was certainly evidence supporting respondent's contention on every issue of fact, which we cannot say was insufficient to warrant the finding.

As to the questions of law involved in the case, it seems clear that, as the agreement of appellant to employ respondent, as agent of the building after its completion at the agreed compensation was the consideration of the latter's agreement to take $60 per month for his previous services, the failure of appellant to so employ respondent was a breach of the contract, which released the latter therefrom, and authorized him to treat it as rescinded, and to recover for his services what they were reasonably worth. This, of course, is the general rule applicable to such case, and it is too elementary to need reference to authorities. It is contended, however, that the rule does not apply in the case at bar, because the contract for permanent employment was only for an indefinite time, that it cannot be specifically enforced, and that it could be terminated by either party upon reasonable notice. But this is not an action to compel a specific performance of the contract for employment after the completion of the building, nor to recover compensation for his services after such completion, nor to recover future profits which respondent might have earned after that time if appellant had complied with his said promise of future employment. The action is for services rendered prior to the time when the

future employment at $150 was to commence. It is based upon the theory that appellant's promise of the future employment was the consideration of respondent's promise to do the previous work for a compensation much less than its real value, that each of said promises was part of the contract, and that appellant's refusal to perform his said promise abrogated the contract, and entitled respondent to recover the reasonable value of his past services. This theory is well founded in legal principles, as it is in considerations of justice and fair dealing. * * *

The judgment and order appealed from are affirmed.

KEHOE v. RUTHERFORD.

(Supreme Court of New Jersey, 1893. 56 N. J. Law, 23, 27 Atl. 912.)

Action on a contract by John Kehoe against the mayor and common council of the borough of Rutherford.

Heard on a rule to show cause why a new trial should not be granted after order of nonsuit.

DIXON, J. On October 15, 1888, the plaintiff and defendant entered into a written contract, under seal, by which the plaintiff became bound to grade, work, shape, level, smooth, and roll Montrose avenue, in the borough of Rutherford, to its entire width, according to the established grade, commencing at Washington avenue, and ending at Pierpont avenue, and the defendant became bound to pay him therefor 65 cents per lineal or running foot.

Soon afterwards, the plaintiff began the work, and continued until it was discovered that some of the land to be graded under the contract was private property. Then, being forbidden by the owners to enter upon this property, the plaintiff stopped the work, by direction of the borough authorities, and concluded to abandon it. In the mean time, he had been paid $1,850 of the contract price.

On this state of facts, he brought suit against the defendant, relying, in one count of his declaration, upon the breach of the special contract, and, in another, on the quantum meruit for the work done.

At the trial in the Bergen circuit the plaintiff's evidence tended to prove that the length of the whole work required by the contract was 4,220 feet, which, at the contract rate,—65 cents per lineal foot,—made the aggregate price $2,743; that about 3,500 feet in length had been substantially graded, but still needed trimming up and finishing; that in doing this work he had excavated about 8,000 cubic yards of earth, and had put in about 1,300 cubic yards of filling; that, to complete the job, about 14,000 cubic yards of filling were still necessary, besides the trimming up and finishing of the entire length of the street. His evidence further indicated that the fair cost of the work done was:

8,000 cubic yards of excavation, at 35 cents	$2,800
900 cubic yards of filling, at 21 cts	189
400 cubic yards of filling, at 41 cts	164
Making a total of	$3,153

—and that the fair cost of the work remaining to be done, in completely performing the contract, was:

14,000 cubic yards of filling, at 12 cents	$1,680
4,220 feet of finishing, at 5 cents	211
Making a total of	$1,891

—thus showing the fair cost of the whole work required by the contract to be $5,044.

These calculations are, in every instance, based upon the testimony most favorable to the plaintiff; allowing him the highest estimates for what he had done, and reckoning the residue at the lowest. If his own estimates, or those of any single witness, were taken throughout, the result would be more to his disadvantage.

Upon the evidence thus presented, the plaintiff was nonsuited, and a rule allowed that the defendant show cause why a new trial should not be awarded.

The nonsuit was ordered upon the theory that the plaintiff could recover, for the work done, only such a proportion of the contract price as the fair cost of that work bore to the fair cost of the whole work required, and, in respect of the work not done, only such profit, if any, as he might have made by doing it for the unpaid balance of the contract price. Under this theory, his recovery for the work done was to be limited to such a proportion of $2,743 as 3,153 bears to 5,044, viz. $1,715; and as to the work not done, since it would cost him $1,891 to do it, while the unpaid balance of the price was only $893, no profit could be earned by doing it. Hence, it was considered that he had been overpaid to the extent of the difference between $1,850 and $1,715.

But the contention of the plaintiff was and is that, as he was prevented from completing the contract without fault on his part, he is entitled to the reasonable value of the work done, without reference to the contract price; and if this be the correct rule, undoubtedly the case should have gone to the jury. But, at the very threshold, we are confronted with this possible result of the application of the rule contended for: That the plaintiff might recover $3,153 for doing about three-fifths of the work, while, if he had done it all, he could have recovered only $2,743. The absurdity of the result condemns the application of such a rule. Circumstances may exist in which, for work done under a special contract, the plaintiff will recover its fair value. Thus, if the contract be within the prohibition of the statute of frauds, (McElroy v. Ludlum, 32 N. J. Eq. 828;) or if, the work being only partly done, that which is done, or that which is left undone, cannot be measured, so as to ascertain its price at the rate specified in the con-

tract, (Derby v. Johnson, 21 Vt. 17,) or, in the absence of evidence to the contrary, it may be assumed that the rate specified is a reasonable one, (U. S. v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168). But, generally, when it can be determined what, according to the contract, the plaintiff would receive for that which he has done, and what profit he would have realized by doing that which, without fault, he has been prevented from doing, then these sums become the legal, as they are the just, measure of his damages. He is to lose nothing, but, on the other hand, he is to gain nothing, by the breach of the contract, except as the abrogation of a losing bargain may save him from additional loss.

This is the rule applied in the case of Masterton v. Mayor, etc., of Brooklyn, 7 Hill (N. Y.) 61, 42 Am. Dec. 38, where the plaintiff was to receive $271,600 for 88,819 feet of marble, and after he had delivered 14,779 feet the defendant stopped him. He was awarded the contract price for the 14,779 feet, and the profit which he would have made by delivering the balance. The same principle was declared by this court in Boyd v. Meighan, 48 N. J. Law, 404, 4 Atl. 778, and accords with the fundamental doctrines laid down by Mr. Sedgwick, (1 Sedg. Dam. [200] 432:) First, that the plaintiff must show himself to have sustained damage, or, in other words, that actual compensation will only be given for actual loss; and, second, that the contract itself furnishes the measure of damages.

Sometimes it has been held that if the contract binds the defendant to pay otherwise than in money, and he refuses, then the plaintiff may recover the cash value of what he has done or delivered. Ankeny v. Clark, 148 U. S. 345, 13 Sup. Ct. Rep. 617, 37 L. Ed. 475. But in New Jersey the rule is that he shall recover the cash value of what he was to receive, (Hinchman v. Rutan, 31 N. J. Law, 496,) thus maintaining the standard fixed by the contract.

Some of the obscurity surrounding this subject springs, I think, from a failure to distinguish between the right to sue upon the quantum meruit, when the contract remains uncompleted through the fault of the defendant, and the measure of damages in such a state of facts. It is well settled that if the plaintiff has fully performed his contract, so that nothing remains but the duty of the defendant to pay, the plaintiff may declare upon the quantum meruit, ignoring the special contract, and the plaintiff's readiness and offer to perform are to this extent, but to this extent only, (Shannon v. Comstock, 21 Wend. [N. Y.] 457, 34 Am. Dec. 262) equivalent to actual performance. In both cases, however, the amount which the plaintiff deserves to recover is regulated by the contract. The refusal of the defendant to pay, after all the work is done, is no less a breach of the contract than is his refusal to permit the plaintiff to do all that the bargain entitled him to do; but neither breach does or ought to put the parties in the position they would have occupied if no contract had been made. In both cases,

what is done was done under the contract, and should be paid for accordingly.

If, on partial performance, the plaintiff confines himself to the common counts, he excludes by his pleading any claim for what he has not performed, but he does not thereby enhance his deserts for what he has performed; and therefore, in order to obtain complete justice on breach of a profitable bargain, he must resort to a special count.

Our conclusion is that, as the plaintiff had been paid up to the full measure of the contract for the work done, and could have made no profit by its further prosecution, the nonsuit was substantially right. The rule to show cause is discharged.[95]

MOONEY v. YORK IRON CO.

(Supreme Court of Michigan, 1890. 82 Mich. 263, 46 N. W. 376.)

Assumpsit. Defendant brings error.

CAHILL, J.[96] The plaintiffs brought an action in justice's court to recover an amount claimed to be due them for work and labor performed in sinking a mining shaft for the defendant. The plaintiffs recovered a judgment in justice's court, and the defendant appealed to the circuit, when the plaintiffs again had judgment, and the case is brought to this court on writ of error. The case made by the plaintiffs is that they made a contract with defendant through Capt. Florida, who was at the time superintendent of the defendant company, by which they were to sink a shaft 8 by 11 feet, down to the "ledge," and timber the same up; plaintiffs to furnish everything, and to be paid $10 per foot. They claimed that they sunk the shaft to the "ledge," and had timbered it to within 8 or 10 inches of the "ledge," when they were stopped in their work by Capt. Carlin, who, as they claim, had immediate charge of the mining operations for the defendant. They

[95] Accord: Dobbins v. Higgins (1875) 78 Ill. 440; Doolittle v. McCullough (1861) 12 Ohio St. 360, 366; Noyes v. Pugin (1891) 2 Wash. 653, 27 Pac. 548. In the case last cited the court said: "If [the plaintiff] had performed the whole work according to his agreement, and appellant had neglected or refused to pay him therefor, and he had brought his action upon the common counts for work and labor, instead of suing upon the contract, the measure of recovery, according to the adjudged cases, would have been the contract price. And, this being so, it is difficult to perceive why the respondent in this case should receive more compensation for the labor actually performed by him than he would have received for the same services had the contract not been broken by the appellant. The authorities which hold the contrary doctrine, and maintain that the plaintiff in such cases may recover what his labor was actually worth, without regard to the contract, proceed upon the theory that, if one party to an agreement sees fit to violate it, the law will then step in and imply a new and different one in favor of the other party to the contract. But we think it is rather the province of the law to provide remedies for enforcing contracts, and for indemnifying parties injured by their breach, than to make new and different ones."

See, also, Farnum v. Kennebec Water District (1909) 170 Fed. 173, 95 C. C. A. 355.

[96] Portions of the opinion, discussing another matter, are omitted.

claim the right to recover for the work actually done by them under the quantum meruit on the ground that they were prevented by the defendant, without fault on their part, from performing the contract. The case was submitted to the jury by the circuit judge upon this theory, and the jury were instructed as follows:

"It is the law that if an employer terminate a contract without any fault on the part of the employé or contractor, that then the employé or contractor may sue upon the contract to recover damages, or he may sue in assumpsit upon the common counts, as they are called—the quantum meruit—to recover what his services were worth. That does not mean what they were worth to the employer. It is the fair value; that is, the value of work and labor. Of course, the main question is first as to whether the contract was performed up to that time by the plaintiffs. If it was not, then the defendant had the right to stop the work, and discharge them, and they could not recover. * * *

Counsel for defendant objects to that part of the above charge in which the court said "the plaintiffs might recover upon a quantum meruit what their services were worth; that this does not mean what they were worth to the defendant, but the fair value of the work and labor;" and it is claimed that the true basis of recovery in such cases is not the value of the work and labor, but of the product of the work and labor. We think the circuit judge adopted the correct rule. If the plaintiffs had abandoned the work, without being directed to do so by the defendant, and the defendant had appropriated the work to its own use, the rule contended for by defendant's counsel would have been correct. That rule was recognized, and clearly stated by the circuit judge in his charge. But where, as in this case, the plaintiffs are prevented from performing the contract, they are entitled to recover, if at all, what their work and labor is worth, whether it was of value to the defendant or not. The case of Clark v. Mayor, etc., 4 N. Y. 338, 53 Am. Dec. 379, cited by defendant's counsel, does not support a contrary doctrine. * * *

The judgment is affirmed, with costs.[97]

[97] Accord: Hemminger v. Western Assurance Co. (1893) 95 Mich. 355, 54 N. W. 949. ("Where the party suing is not responsible for the breach, neither the right nor the amount of the recovery depends upon the measure of benefit received by the party guilty of the breach.")

Compare Fabian v. Wasatch Orchard Co., page 331, supra.

In Hosmer v. Wilson (1859) 7 Mich. 294, 74 Am. Dec. 716, the plaintiff agreed to manufacture for the defendant an engine for a certain price. Before the engine was completed the order was countermanded by the defendant and the materials remained in the plaintiff's hands. It was held that the plaintiff could not recover on the common counts the value of his labor and of such materials, on the ground that the defendant had no interest in the materials, and no concern with the amount of labor; but that the plaintiff's labor was upon his own materials to increase their value, for the purpose of effecting a sale to the defendant of the article ordered, when complete.

See, to the same effect, Atkinson v. Bell (1828) 8 B. & C. 277, 283; Manning Mfg. Co. v. Miller Bros. (1914) 87 Vt. 455, 89 Atl. 479. Compare Dowling v. McKinney, page 328, supra.

FARRON v. SHERWOOD.

(Court of Appeals of New York, 1858. 17 N. Y. 227.)

Appeal from the Superior Court of Buffalo. The complaint was: "First. That the defendant is indebted to the plaintiff in the sum of fourteen hundred and twenty-nine and 54/100 dollars, for work, labor and services done and performed for the defendant, at his special instance and request, at the city of Buffalo, by the plaintiff and his servants and agents, at divers times between the 8th day of March, 1852, and the commencement of this action, in and about quarrying, dressing, preparing, delivering, putting together and erecting certain building stones, in and about defendant's dwelling on Main-street, in said city of Buffalo, and that the said work, labor and services were reasonably worth the sum of fourteen hundred and seventy-nine and 54/100 dollars; and that the defendant has not paid the plaintiff the said sum nor any part thereof, but has hitherto wholly neglected and refused so to do.

"Second. And, for a second cause of action against the defendant, the plaintiff says that the defendant is indebted to him in the sum of thirty-eight and 4/100 dollars, for certain dressed building stones, before the commencement of this action sold and delivered by the plaintiff to the defendant, at the city of Buffalo, at defendant's special instance and request; that the said building stones were reasonably worth the said sum of thirty-eight and 4/100 dollars; and that the defendant has not paid the plaintiff the said sum, or any part thereof, but has hitherto wholly neglected and refused so to do. Wherefore the plaintiff demands judgment against the defendant for the sum of fifteen hundred and seventeen dollars and sixty-three cents, besides the costs of this action."

The defendant, by his answer, denied each and every allegation of the complaint. The action was tried before a referee. Upon the trial, the plaintiff produced several witnesses, who proved the work, labor and materials specified in a bill of particulars, furnished the defendant, of the plaintiff's claim, and the value of the different items; and then rested. Whereupon the defendant proved payment of $1002, and then proved and read in evidence a special contract between him and the plaintiff, under which the labor, except sixty-four days' labor, worth $2 a day, and altering a buttress, worth $6, was done. Upon the proof and pleadings the cause was submitted to the referee, "the defendant then and there insisting that the plaintiff could not recover but for the extra work, except upon the special contract, which he had neither stated in the complaint nor proved;" but the referee overruled the objection; to which the defendant excepted. The referee reported in favor of the plaintiff for $299.55. Judgment having been entered on the report, the defendant appealed to the general term of the Superior

Court, by which the judgment was affirmed; and the defendant thereupon appealed to this court.

STRONG, J. The first point made by the counsel for the appellant is, that for the portion of the work and labor done under the special contract, the remedy of the plaintiff was upon that contract; and that he was not entitled to recover upon the common counts. It is necessarily assumed in support of this position that the contract is the cause of action for that work and labor; and if that be so, the position is correct; that cause of action not being stated in the complaint, and the objection being taken at the trial, the referee erred in allowing the part of the plaintiff's claim in question. But the assumption is wholly unwarranted in the case. It was not objected at the trial that the contract had not been fully performed on the part of the plaintiff; no question was raised, and, so far as appears, there was no ground for any question on that subject. Hence it must be deemed that the plaintiff had done all that was incumbent on him to do, and that nothing remained to be done by the contract but payment of the stipulated price by the defendant.

The case is, therefore, within the well-settled rule that where there is a special agreement and the plaintiff has performed on his part, the law raises a duty on the part of the defendant to pay the price agreed upon, and the plaintiff may count either on this implied assumpsit or on the express agreement. A new cause of action upon such performance arises from this legal duty, in like manner as if the act done had been done upon a general request without an express agreement. Lawes' Plead. 5; Jewell v. Schroeppel, 4 Cow. 564; Feeter v. Heath, 11 Wend. 484; Mead v. Degolyer, 16 Wend. 637, 638; Clark v. Fairchild, 22 Wend. 576. This rule is not affected by the Code; the plaintiff might, as he has done, rest his action on the legal duty; and his complaint is adapted to and contains every necessary element of that cause of action. It was not necessary to state in terms a promise to pay; it was sufficient to state facts showing the duty from which the law implies a promise; that complies with the requirement that facts must be stated constituting the cause of action. Allen v. Patterson, 7 N. Y. 476, 57 Am. Dec. 542.

The defendant was not precluded by the form of the complaint from setting up and availing himself of any defense he had under the contract. Judgment affirmed.[98]

[98] "We take it to be incontrovertibly settled that Indebitatus assumpsit will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed, and that it is not in such case necessary to declare upon the special agreement." Per Story, J., in Bank of Columbia v. Patterson's Adm'r (1813) 7 Cranch (U. S.) 299, 303, 3 L. Ed. 351.

RECOVERY BY PLAINTIFF WHO HAS FULLY PERFORMED CANNOT EXCEED CONTRACT PRICE.—Where the plaintiff has fully performed a contract now repudiated by defendant, the amount of his recovery in quasi contract is limited to the compensation expressed in the contract (a doctrine disapproved of by

SLAYTON v. McDONALD et al.

(Supreme Judicial Court of Maine, 1881. 73 Me. 50.)

On motion to set aside the verdict. On appeal from the municipal court of Calais.

VIRGIN, J.[99] Assumpsit on an account annexed comprising fourteen items of various articles of iron casting, of different dates, running from December 16, 1878, to the following August. The plaintiff is an iron founder, and the defendants—William McDonald and his son James—machinists, having a shop where they manufacture and repair mill and other kinds of machinery. The defendants admit their liability for items numbered 2, 8, 9 and 12, and for these charges the action is well brought in the usual form of indebitatus assumpsit for goods sold and delivered; but they deny all connection with the remaining items.

The remaining items, except 3, 4, 5 and 6, comprised four sets of "lathe castings"—that is a sufficient number and quantity to make four lathes when finished. In relation to these, the plaintiff testified in

text-writers—Keener, Quasi Contracts, 300–301; Woodward, Quasi Contracts, § 362).

In Dermott v. Jones (1864) 2 Wall. (U. S.) 1, 17 L. Ed. 762, Swayne, J., said: "While a special contract remains executory the plaintiff must sue upon it. When it has been fully executed according to its terms, and nothing remains to be done but the payment of the price, he may sue on the contract, or in indebitatus assumpsit, and relying upon the common counts. In either case the contract will determine the rights of the parties."

In Porter v. Dunn (1891) 61 Hun, 310, 16 N. Y. Supp. 77, the plaintiff and his wife boarded and cared for the defendant's testator, a consumptive invalid, for more than two years under an agreement by which the latter was to bequeath to the plaintiff's wife a legacy of $5,000. This the testator failed to do, giving her a legacy of $500 only. Plaintiff then filed a claim against the estate of the testator for services rendered and expenses paid and was awarded $8,404.28. The executor appealed and the general term reduced the amount of the claim to $5,000; Daniels, J., saying: "There was no dissent from the proposal of the testator that he would compensate the rendition of the services by this sum of $5,000 to be bequeathed by his will. The services were rendered and the attentions were bestowed upon him by the claimant's wife, with the understanding that they should be compensated in this manner and the omission of the testator to make that provision in the will, and thereby perform the obligations of his contract, was not attended with any increase of liability on his part or on the part of his estate. For the sum of $5,000 was all that was to be paid for the services and attention which it was understood would be required by him. And they were rendered upon the understanding that this sum should form a complete remuneration on the part of the testator. And under this state of the facts, the claimant was not at liberty to recover for the value of the services themselves, but should have been restricted to this sum of $5,000, which the testator agreed to provide by his will, but in the end failed to do."

See, also, Ryan v. Remmey (1895) 57 N. J. Law, 474, 31 Atl. 766; Barnett v. Sweringen (1898) 77 Mo. App. 64, 71.

[99] The statement of facts is omitted.

substance—that he delivered them in accordance with a verbal contract with one W. Randolph McDonald, (son of William and brother of James, the defendants, one of their workmen and book-keeper,) whereby it was agreed that the defendants should have three of the sets for finishing and fitting the other for the plaintiff; that in making this contract Randolph professedly acted as agent of the defendants; that prior thereto Randolph had frequently come to the plaintiff's foundry and ordered castings for the defendants which they had invariably paid for; that the defendants, in June, 1879, on complaint being made to them of the delay in fitting up the plaintiff's lathe, declared it should be done right away; but that they still neglecting to finish it, he on August 26, 1879, brought this action.

Assuming this testimony to be true, and that Randolph had authority to make the contract in behalf of the defendants, this form of action cannot be maintained for the recovery of the value of the lathe castings. For the general principle of law is well settled, that where goods are sold to be paid for wholly or in part by other goods or by the defendant's labor, or otherwise than in money, the action must be by special count on the agreement, and for a breach of it, and not for goods sold and delivered—otherwise the proper rule of damages cannot be applied. 1 Chit. Plead. (16th Ed.) 357, and notes; Mitchell v. Gile, 12 N. H. 390, and the numerous cases there cited; Holden S. Mill v. Westervelt, 67 Me. 446, 450, and cases. The verdict is therefore against law.[1]

[1] Accord: Harrison v. Luke (1845) 14 Mees. & W. 139; Snedicor v. Leachman (1846) 10 Ala. 330; Anderson v. Rice (1852) 20 Ala. 239; Shropshire v. Adams (1905) 40 Tex. Civ. App. 339, 89 S. W. 448; Pierson v. Spaulding (1886) 61 Mich. 90, 27 N. W. 865; Mitchell v. Gile (1841) 12 N. H. 390. It should be noted that the Alabama and New Hampshire cases above cited seem to adopt the English rule that plaintiff cannot rescind upon defendant's substantial breach, but only upon his repudiation of the contract.

Contra: Drew v. Claggett (1859) 39 N. H. 431; Clark v. Fairchild (1840) 22 Wend. (N. Y.) 576 (a careful opinion by Cowen, J.). See, also, Keys v. Harwood (1846) 2 C. B. 905, and Brown v. St. Paul, Minneapolis & Manitoba Ry. Co. (1886) 36 Minn. 236, 31 N. W. 941. In the case last cited, after upholding judgment for plaintiff on another ground, Dickinson, J., said (36 Minn. 238, 31 N. W. 942): "I would place the decision upon the proposition, which is not to be taken as adopted by the court, that the defendant having wholly refused to perform the alleged contract on its part, (not being a stipulation for the payment of money,) and the plaintiffs having performed on their part, but having received nothing in return, the defendant cannot hold the plaintiffs bound by the contract, or object if they also disregard its stipulations; that they have, under such circumstances, an election either to stand either upon the special contract and recover for its breach, or to treat it as rescinded, and recover the value of their services as if the special contract had not been made."

If the transaction is for a money consideration payable in goods, plaintiff's right to rescind in a case of repudiation or substantial breach and recover the money value of his goods or services is generally recognized. Wainwright v. Straw (1843) 15 Vt. 215, 40 Am. Dec. 675; Newman v. McGregor (1832) 5 Ohio, 349, 24 Am. Dec. 293. Contra: Pierson v. Spaulding (1886) 61 Mich. 90, 27 N. W. 865.

But if the declaration had contained a special count for the lathe castings, we do not think the jury were warranted in finding that Randolph was authorized to make the contract in behalf of the defendants.

Our opinion therefore is that the verdict is against law and the evidence. Motion sustained.[2]

II. By Plaintiff

OXENDALE v. WETHERELL.

(Court of King's Bench, 1829. 9 Barn. & C. 386.)

Assumpsit for wheat and other corn, goods, wares, and merchandises sold and delivered. Plea, general issue. At the trial before Bayley, J., at the Spring assizes for the county of York 1829, the following appeared to be the facts of the case. The action was brought to recover the price of 130 bushels of wheat, sold and delivered by the plaintiff to the defendant, at 8s. per bushel. Evidence was given on the part of the plaintiff, that on the 17th of September 1828, he had sold to the defendant all the old wheat which he had to spare at 8s. per bushel; and that he had delivered to the defendant 130 bushels. The defendant gave evidence to show that he had made an absolute contract for 250 bushels, to be delivered within six weeks, that the price of corn at the time of the contract was 8s. per bushel, and afterwards rose to 10s.; and it was insisted on his part, that the contract being entire, the plaintiff not having delivered more than 130, had not performed his part of the contract, and therefore could not recover for that quantity. On the other hand, it was contended that the vendor having delivered, and the vendee having retained part, the contract was severed pro tanto, and that the plaintiff was entitled to recover the value. The learned Judge was of opinion, that even if the contract was entire, as the defendant had not returned the 130 bushels, and the time for completing the contract had expired before the action was brought, the plaintiff was entitled to recover the value of the 130 bushels which had been delivered to and accepted by the defendant; but he desired the jury to say, whether the contract was entire for 250 bushels, and they found that it was. Whereupon a verdict was entered for the plaintiff, and the defendant had liberty to move to enter a nonsuit if the Court should

[2] Accrual of Cause of Action.—"When did the statute of limitations begin to run? The answer to this question depends on the date when the cause of action accrued. As long as the contract of purchase was in force, plaintiff could not maintain an action of this nature. Such an action will not lie until the contract has been terminated." Thiele v. Carey (1909) 85 Neb. 454, 123 N. W. 442, 133 Am. St. Rep. 679.

Election.—An election to sue for breach of the contract bars the right to sue on the common counts. Goodman v. Pocock (1850) 15 Q. B. 576, 117 Eng. Rep. 577. So also an election to sue on the common counts bars the right to sue for breach of the contract. Keedy v. Long (1889) 71 Md. 385, 18 Atl. 704, 5 L. R. A. 759. As to what constitutes an election, see Woodward, Quasi Contracts, § 266.

be of opinion that the plaintiff was not entitled to recover, on the ground that he had not performed the contract.

Brougham now moved accordingly, and relied upon Walker v. Dixon, 2 Stark. 281, where the plaintiff having contracted for the sale of 100 sacks of flour, at 94s. 6d. per sack, delivered part, but refused to deliver the residue, the defendant being willing to receive and pay for the whole; Lord Ellenborough held that the plaintiff could not recover for the part delivered, and nonsuited him.

LORD TENTERDEN, C. J. In Manning's Digest, p. 389, the Court are stated to have set aside the nonsuit, ex relatione Wilde, of counsel for the defendant. If the rule contended for were to prevail, it would follow, that if there had been a contract for 250 bushels of wheat, and 249 had been delivered to and retained by the defendant, the vendor could never recover for the 249, because he had not delivered the whole.

BAYLEY, J. The defendant having retained the 130 bushels after the time for completing the contract had expired, was bound by law to pay for the same.

PARKE, J. Where there is an entire contract to deliver a large quantity of goods, consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot, before the expiration of that time, bring an action to recover the price of that part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered. But if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods which he has so delivered.

Rule refused.[3]

[3] "The modern American rule seems to be that a party who has failed to perform in full his contract for the sale and delivery of personal property may recover compensation for the part actually delivered and received thereunder, less the damages occasioned by his failure to make the complete delivery." Saunders v. Short (1898) 86 Fed. 225, 30 C. C. A. 462.

Accord: Shipton v. Carson (1826) 5 B. & C. 378, 108 Eng. Rep. 141; United States v. Molloy (1906) 144 Fed. 321, 75 C. C. A. 283, 11 L. R. A. (N. S.) 487; Gibbony v. R. W. Wayne & Co. (1904) 141 Ala. 300, 37 South. 436; Polhemus v. Heiman (1873) 45 Cal. 573; Hills v. Edmund Peycke Co. (1910) 14 Cal. App. 32, 110 Pac. 1088; Stephens Lumber Co. v. Cates (1911) 62 Fla. 382, 56 South. 298; Richards v. Shaw (1873) 67 Ill. 222; Epperly v. Bailey (1851) 3 Ind. 72; Bowker v. Hoyt (1836) 18 Pick. (Mass.) 555; Hedden v. Roberts (1883) 134 Mass. 38, 45 Am. Rep. 276; Clark v. Moore (1853) 3 Mich. 55; Mead v. Rat Portage Lumber Co. (1904) 93 Minn. 343, 101 N. W. 299; Briggs v. Morgan (1904) 104 Mo. App. 62, 78 S. W. 295; Flanders v. Putney (1878) 58 N. H. 358; Shaw v. Badger (1824) 12 Serg. & R. (Pa.) 275; Porter v. Woods (1842) 3 Humph. (Tenn.) 56, 39 Am. Dec. 153.

In many of the cases above cited it seems that the defendant, when he accepted a delivery of the portion of the goods covered by the contract, for the value of which the action was brought, was aware that plaintiff was unable or unwilling to complete his performance of the contract.

The authorities generally seem to pay little attention to the reasons which induced plaintiff's breach, and to the question whether or not he attempted to fulfill his contract in good faith. But this point is considered in Viles v. Barre & M. Traction & Power Co. (1906) 79 Vt. 311, 65 Atl. 104, where the court said: "In the circumstances of the case, if the plaintiff could satisfy

CHAMPLIN v. ROWLEY.

(Supreme Court of New York, 1835. 13 Wend. 258.)

This was an action of assumpsit, tried at the Dutchess circuit in November, 1830, before the Hon. Charles H. Ruggles, one of the circuit judges.

The declaration contained the common counts only for goods and chattels, and hay sold and delivered by the plaintiff to the defendant. On the trial of the cause, the defendant admitted that in the autumn of the year 1831, the plaintiff delivered to him, at a dock at Rhinebeck, 52 tons and 900 lbs. of pressed hay, and that the value thereof was three shillings and sixpence per 100 weight, and that the last load was delivered about the seventh day of December, when the river closed or the navigation was interrupted by ice. The defendant then proved, that on the 12th September, 1831, a contract was entered into between him and the plaintiff, whereby the plaintiff agreed to deliver to him, at the state dock in Rhinebeck, 100 tons of hay, and all the hay that the plaintiff had to spare beyond that quantity, to be delivered pressed, between that time and the last run of the sloops; for which the defendant was to pay the plaintiff at the rate of three shillings and sixpence per 100 wt.—$100 to be paid in advance, and the residue when the whole quantity should be delivered. The defendant also proved, that about the middle of September he paid the $100 to the plaintiff, and that the plaintiff had admitted that the quantity of hay he had to spare was between 150 and 200 tons. He further proved that no hay was delivered by the plaintiff previous to the 25th October, and that the last load of hay delivered by the plaintiff was delivered a day or two previous to the closing of the navigation; at which time only the quantity of 52 tons and 900 wt. had been delivered. In addition to which evidence, the defendant offered to prove, in pursuance of a notice attached to his plea, that after the making of the contract, the price of hay rose in market to eight shillings, and from that sum to ten shillings per 100 wt.; and that had the plaintiff performed his contract, the net profits which the defendant would have made upon the hay

the jury that he had endeavored in entire good faith to fulfill the contract to the letter, then he was entitled to a quantum meruit recovery unless the amount of damage resulting to the defendant from the breach of contract was such as to prevent such recovery. The common-law rule, which sometimes worked hardships undeserved and unsalutary, has been somewhat relaxed; but good faith in endeavoring to perform fully and exactly is essential to a quantum meruit in a case like this. In such a case, unless the party in default has in good faith endeavored to accomplish full performance, he deserves nothing. To hold otherwise would be to encourage a disregard of contract obligations." Also in Wilson v. Wagar (1873) 26 Mich. 452, 465, Christiancy, J., held that this doctrine "should be confined to cases in which the application of the strict principles of the old common law would savor of hardship and injustice, and should therefore, never be allowed to a plaintiff who has wantonly or in bad faith, or as a mere matter of speculation, refused to perform his contract."

undelivered would have exceeded the sum now claimed by the plaintiff for the hay which had been delivered. The defendant also offered to prove, that in consequence of the contract made with the plaintiff, he had hired a store-house in the city of New York for the reception of the hay, at a rent of $90, which he had been obliged to pay; and that in consequence of the non-performance of the plaintiff in the delivery of the hay, the store-house had been unoccupied and of no use to the defendant—which evidence thus offered to be given was objected to by the plaintiff, and rejected by the judge. The defendant then insisted that the plaintiff was not entitled to recover, 1. Because the special contract being in force and unrescinded, the plaintiff could not recover without showing a full performance on his part; and 2. That at all events, he could not recover under the common counts. The judge decided that the case came within the rule of law, that where the plaintiff's contract or covenant goes only to a part of the consideration of the defendant's contract, and the breach may be compensated in damages, and the defendant has actually received a partial benefit, the plaintiff may support an action without showing performance; that it was not necessary that the plaintiff should have declared on the special agreement, and that he was entitled to recover on the common counts. The judge accordingly directed the jury that the plaintiff was entitled to their verdict for the value of the hay delivered, at three shillings and sixpence per 100 wt., after deducting the $100 paid, together with the interest of the balance from the 9th December, 1831, when the navigation closed. The jury, without leaving the box, found a verdict for the plaintiff for the sum of $386.64. The defendant moves for a new trial.

Nelson, J. Unless we are at liberty to make a contract for these parties, it is perfectly clear, that beyond the $100 which was to be paid in advance, the defendant is not bound to make any payment towards the hay, until the whole quantity agreed to be delivered, viz. 100 tons, and all besides that the plaintiff had to spare, has been actually received by him. The residue of the price of the hay, after the payment of the $100, was to be paid when the whole quantity should be delivered. Such are the express terms of the contract, and we are not left to doubtful construction to ascertain the intention of the parties. Whether any thing short of the act of the defendant himself could legally dispense with the performance of the precedent condition, is a question which we need not examine; for it is clear that there is nothing in the contract, or in the case as presented to us, which can have that effect. Moakley v. Riggs, 19 Johns. 71, 10 Am. Dec. 196; Taylor v. Bullen, 6 Cow. 627; 6 T. R. 211. The plaintiff assumed to deliver the whole quantity of hay previous to the last run of the sloops, and he must abide the consequences of his default. We know that it was possible to have performed the contract on his part. The case falls within principles familiar in this court, which inculcate the observance of good faith in the fulfilment of contracts.

McMillan v. Vanderlip, 12 Johns. 165, 7 Am. Dec. 299; Thorpe v. White, 13 Johns. 53; Jennings v. Camp, 13 Johns. 94, 7 Am. Dec. 367; Ketchum v. Evertson, 13 Johns. 359, 7 Am. Dec. 384.

It is unnecessary to comment upon the English cases, as the subject now under consideration has frequently been presented to this court; and the principles applicable to it have been clearly stated and settled. Some of the cases relied upon by the counsel for the plaintiff have been referred to, and their authority repudiated by this court. The case decided by Lord Hale at the Norfolk assizes, 1662, is pronounced by Judge Spencer, in McMillan v. Vanderlip, 12 Johns. 165, 7 Am. Dec. 299, "a very unreasonable decision." In that case, Judge Spencer also noticed the qualification to the case of Waddington v. Oliver, 5 Bos. & Pul. 61, that the plaintiff had no right to bring an action "until the time for the delivery of the whole had arrived," and expressed his inability to perceive the grounds on which it rests; and disregarded it in that case and in the subsequent cases, 13 Johns. 94, 7 Am. Dec. 367, and 13 Johns. 365, 7 Am. Dec. 384. The modern case of Oxendale v. Wetherel, 17 Com. Law R. 401, is as exceptionable and as repugnant as the case decided by Lord Hale, to the principle of the cases determined in this court, and therefore cannot be regarded.

If the action could have been sustained upon the common counts, I have no doubt the defence offered in mitigation of damages would have been admissible and proper, within the principles of the case of Reab v. McAlister, decided in the court for the correction of errors, 8 Wend. 109. New trial granted.[4]

[4] Case was affirmed on appeal by the Court for the Correction of Errors. Champlin v. Rowley (1837) 18 Wend. 187. In that court Chancellor Walworth said, in part: "In Oxendale v. Wetherell, 9 Barn. & Cress. 386, it was held that the party who had failed to perform his contract could recover against the other who had not been in fault, for the wheat delivered in part performance of his agreement, unless the defendant had returned the wheat delivered. This decision carried to the extent it was in that case, cannot be considered as good law anywhere; for it is not founded upon any equitable principle, and is contrary not only to justice, but also to common sense. The only way I can account for it, is upon the supposition that the facts of the case are not properly stated in the report; or that the injustice of requiring the party who was not in fault to be at the expense of returning to the other party bulky articles of this description, or even of seeking him for the purpose of making an offer to return them, to protect himself from an action, was not presented to the consideration of the court. Again: in that case, as in this, the contract was not to deliver the whole quantity at one time, but to deliver the whole within a certain specified period. Neither was there any agreement, either express or implied, that the defendant should not be permitted to sell or use the several parcels, delivered from time to time, until the latest period for completing the contract had actually expired. Here the contract was to deliver a large quantity of pressed hay upon the dock at Rhinebeck, between the 12th of September and the closing of the navigation on the river; from which it is fairly to be inferred that it was understood by both parties that it was to be transported from thence to the market where such an article as pressed hay was used, by water, and while the river remained open. The plaintiff, therefore, was not bound to take all the hay to the dock at once; but the defendant, by his contract, was bound to receive it in reasonable parcels, as it was brought to the place appointed for the delivery within the time specified. Lewis v. Weldon, 3 Rand. (Va.) 71. Neither is it the sensible

construction of this agreement, that the defendant was to keep the fifty-two tons of hay on hand at Rhinebeck dock, until after the navigation closed, for the purpose of seeing whether the other party intended to perform his agreement as to the delivery of the residue. The idea of founding an action upon the neglect of the defendant to return the hay delivered in such a case, therefore, is not founded in good sense. And I confess I can see no ground for the distinction which has been established by the English cases since the revolution, between the part performance of a contract for labor and a partial performance of a contract for the delivery of specific articles under such an agreement as this. If the fifty-two tons of hay delivered under this contract were in New York at the time the navigation closed, as it may fairly be presumed they were, if the defendant had paid a reasonable attention to his own interest, or if the wheat in the case of Oxendale v. Wetherell, had been sold or converted into flour before the failure of the plaintiff to perform the residue of his contract, it would be about as unreasonable to require the defendant to return the hay to the plaintiff as it would be to return the fruits of the labor of a man who had neglected to perform his contract for labor in full."

In accord with the principal case are: Mead v. Degolyer (1837) 16 Wend. 632. (The plaintiff "furnished a part of the timber, and then, without any excuse or apology whatever, stopped short, and now claims to recover for the timber actually delivered. The mere statement of the case furnishes a complete answer to the action.") Catlin v. Tobias (1863) 26 N. Y. 217, 84 Am. Dec. 183. (Plaintiff unable to complete contract owing to his having failed in business.) Witherow v. Witherow (1847) 16 Ohio 238. (But see strong dissenting opinion.) Brown v. Fitch (1867) 33 N. J. Law, 418. Russell v. Stewart (1870) 64 N. C. 487. (Willful refusal by a plaintiff to complete his contract.)

In jurisdictions where this doctrine prevails the courts are alert to discover evidence of a waiver of the harsh requirement that all the goods must be delivered before any liability to pay arises. In Avery v. Willson (1880) 81 N. Y. 341, 37 Am. Rep. 503, plaintiff contracted to supply defendants with a certain quantity of cut glass, delivery to be made all at one time. Plaintiff delivered a portion of the glass, and defendants at the time made no objection to such partial delivery. Held, that plaintiff could recover the value of the glass delivered. "While then the defendants were not bound to accept a delivery of a portion of the boxes of glass, and had a right to reject or retain the same as they saw fit, yet if they elected to receive the part delivered, appropriated the same to their own use, and by their acts evinced that they waived this condition, they became liable to pay for what was actually delivered. This rule is established in numerous reported cases, and the question of waiver is frequently one of fact to be determined by the circumstances and the evidence."

See, also, Brady v. Cassidy (1895) 145 N. Y. 172, 39 N. E. 814; Downs v. Marsh (1861) 29 Conn. 409; Churchill v. Holton (1888) 38 Minn. 519, 38 N. W. 611.

The Uniform Sales Act, § 44, contains the following provision: "Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts or retains the goods so delivered, knowing that the seller is not going to perform the contract in full, he must pay for them at the contract rate. If, however, the buyer has used or disposed of the goods delivered before he knows that the seller is not going to perform his contract in full, the buyer shall not be liable for more than the fair value to him of the goods so received."

See Williston on Sales, § 458.

ALLEN v. BURNS.

(Supreme Judicial Court of Massachusetts, 1909. 201 Mass. 74, 87 N. E. 194.)

Exceptions from Superior Court, Suffolk County; Robert F. Raymond, Judge.

Action by Walter B. Allen and others against Caroline S. Burns. Judgment for plaintiffs, and defendant excepts.

KNOWLTON, C. J. The only question in this case is one of pleading. The first count is upon an account annexed, the first item of which is, "House remodeled and redecorated as agreed, $4,728.25." Then follow 39 items for additional labor and materials in connection with the work referred to in the contract. The second count is upon a special contract in writing, a copy of which is annexed, and it is averred that the plaintiffs in all respects kept and performed all the covenants, and agreements, express and implied, in said contract by them to be kept and performed, and that there remains unpaid the plaintiffs under said contract the sum of $1,728.25, etc. The plaintiffs offered the auditor's report and rested. The defendant offered evidence tending to show that the plaintiffs had not performed the contract. The plaintiffs in rebuttal offered evidence tending to show an acceptance of the work and materials as a substantial performance of the contract.

The principal finding of the auditor bearing upon the matter in dispute was as follows: "I find on the evidence that she voluntarily accepted and received the benefits of the plaintiff's part performance, with full knowledge that the contract had not been strictly fulfilled." The defendant requested the court to rule "that the report of the auditor was not evidence of acceptance of the performance of the contract by the defendant." This request was refused and the defendant excepted. By the terms of the contract the balance of the contract price was payable "upon completion of the work." The defendant requested the court to rule "that a strict performance of the contract was a condition precedent to the payment to the plaintiffs of the final payment set forth in the contract." Also "that if the contract was not fully performed by the plaintiffs, they could not recover on the second count of the plaintiffs' declaration." The court declined so to rule, but ruled that if there had been a substantial performance by the plaintiffs of the contract in suit, they were entitled to recover, under either count of the declaration, the contract price, less payments made by the defendant on account, and certain deductions for deviations from the contract, and found for the plaintiffs in the sum of $1,580.25, with interest from June 1, 1906, as the balance due on the special contract, and found for the plaintiffs in a certain sum, on items 2 to 40 in the account annexed to the first count of the declaration.

The ruling shows that the judge made deductions from the contract price for deviations from the contract, and we infer from the record,

although perhaps this is not certain, that the amount of these deductions was $148.50. He found that there had been a substantial performance of the contract, and that the defendant had accepted the work and materials furnished by the plaintiffs as a substantial performance of their contract, with a full knowledge that the contract had not been strictly performed.

These findings and rulings and refusals to rule, in a case where there was such a failure to perform a building contract as to call for a substantial reduction from the contract price under the rule stated in Hayward v. Leonard, 7 Pick. 181, 19 Am. Dec. 268, which permits a recovery when there has been an attempt in good faith to perform such a contract and a substantial performance of it, present the question whether there can be a recovery upon such facts, under a count averring performance of a special contract, or whether there must be a count in indebitatus assumpsit, or some other statement of the grounds of recovery.

We think it has generally been assumed that, in such a case, there can be no recovery under a count averring performance of the special contract by the plaintiff and a breach of it by the defendant. Hayward v. Leonard, ubi supra; Snow v. Ware, 13 Metc. 42; Gillis v. Cobe, 177 Mass. 584, 59 N. E. 455; Norwood v. Lathrop, 178 Mass. 208, 59 N. E. 650; Burke v. Coyne, 188 Mass. 401–404, 74 N. E. 942. On principle there cannot be a recovery upon an averment of performance in such a case, because the proof shows a variance.

The acceptance of the work as a substantial performance of the contract, notwithstanding known omissions to do that which was required, is a waiver, and, upon an averment of performance, a plaintiff cannot recover by proof of a waiver. Colt v. Miller, 10 Cush. 49; Palmer v. Sawyer, 114 Mass. 1; Freeland v. Ritz, 154 Mass. 257, 28 N. E. 226, 12 L. R. A. 561, 26 Am. St. Rep. 244.

The ruling as to recovery under the second count was erroneous. Whether the words, "as agreed" in the statement of the first item in the first count would prevent the maintenance of the action on that item it is not necessary to consider, for the finding was on the special contract, and only upon items 2 to 40 in the first count.

As the defendant relied upon these questions of pleading at the trial, and, so far as appears might have tried her case differently if she had not relied upon them, she is entitled to a new trial.

Exceptions sustained.[5]

[5] "Formerly it was generally held in this country, as it is held in England, that a contractor could not recover under a building contract, unless there was a full and complete performance of it, or a waiver as to the parts not performed, and that he could not recover on a quantum meruit after a partial performance from which the owner had received benefit, unless there had been such subsequent dealings between the parties as would create an implied contract to pay for what had been done. Smith v. Brady, 17 N. Y. 185, 72 Am. Dec. 442; Ellis v. Hamlen, 3 Taunt. 52; Munro v. Butt, 8 E. & B. 738; Sumpter v. Hedges, [1898] 1 Q. B. 673, and cases cited. But in most of the American states a more liberal doctrine has been established in

FEENEY v. BARDSLEY.

(Court of Errors and Appeals of New Jersey, 1901. 66 N. J. Law, 239, 49 Atl. 443.)

Error to supreme court.

Action by Owen Feeney against Joseph Bardsley. Judgment for plaintiff. Defendant brings error.

VAN SYCKEL, J.[6] This suit was brought by Feeney, the defendant in error, to recover the balance alleged to be due to him upon a building contract. The plaintiff in error relies for reversal upon alleged errors in the charge of the trial court. The trial judge charged that, if the contractor did not substantially comply with the contract, he could not recover. He told the jury that, if a builder contracts to erect a two story and a half house, and he erects only a one story and a half house, he cannot recover, although he has added value to the owner's property. But, if the contractor has substantially performed his contract, even though he has failed to do so in some minor particulars, he is entitled to recover the contract price, less what will be a fair allowance to the

favor of contractors for the construction of buildings, and it is generally held that if a contractor has attempted in good faith to perform his contract and has substantially performed it—although by inadvertence he has failed to perform it literally according to its terms—he may recover under the contract, with a proper deduction to the owner for the imperfections or omissions in the performance. Woodward v. Fuller, 80 N. Y. 312; Phillip v. Gallant, 62 N. Y. 256; Nolan v. Whitney, 88 N. Y. 648; Oberlies v. Bullinger (1892) 132 N. Y. 598, 30 N. E. 999; Elliott v. Caldwell, 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; Jones & Hotchkiss Co. v. Davenport, 74 Conn. 418, 50 Atl. 1028; Pitcairn v. Philip Hiss Co., 113 Fed 492, 51 C. C. A. 323; Page on Contracts, §§ 1603, 1604, and cases cited. * * * The reason for this construction of such contracts is in part the difficulty of attaining perfection in the quality of the materials and workmanship, and of entirely correcting the effect of a slight inadvertence, and the injustice of allowing the owner to retain without compensation the benefit of a costly building upon his real estate, that is substantially, but not exactly, such as he agreed to pay for. In none of the courts of this country, so far as we know, is the contractor left remediless under conditions like those above stated. The recovery permitted is generally upon the basis of the contract, with a deduction for the difference between the value of the substantial performance shown and the complete performance which would be paid for at the contract price. In Massachusetts the hardship upon the contractor of leaving him without compensation, if, acting in good faith, he performs a contract substantially, but fails to perform it completely, was early recognized by the courts, and it was decided that under such circumstances he might recover upon a quantum meruit. In Massachusetts this method of obtaining relief has ever since been treated as the only one for such cases, and has often been referred to as the doctrine stated in Hayward v. Leonard, 7 Pick. 186, 19 Am. Dec. 268. Because of this rule it is held to this day that, if the declaration is upon the contract alone, there can be no recovery under a building contract unless there has been a complete performance of it. Allen v. Burns, 201 Mass. 74, 87 N. E. 194, and cases cited." Per Knowlton, C. J., in Bowen v. Kimball (1909) 203 Mass. 364, 89 N. E. 542, 133 Am. St. Rep. 302.

A valuable collection of the authorities on "substantial performance" is found in a note in 24 L. R. A. (N. S.) 337.

[6] A portion of the opinion is omitted. Because of error committed by the court below as to the point discussed in such omitted portion a new trial was granted.

owner to make good the defects in the performance of the contract. The court further charged that, if there was not a substantial compliance with the contract, the jury could find a verdict for the contractor for what the building was reasonably worth, if the owner had accepted the house; but that in determining the question of acceptance it was not sufficient to find that the owner was occupying it.[7] It is a house built upon his land, and, unless he tears it down, he must make some use of it, so that the jury must find some positive act on his part showing an intention to accept it. This instruction to the jury is strictly in accordance with the views expressed by Mr. Justice Magie in the supreme court in Bozarth v. Dudley, 44 N. J. Law, 304, 43 Am. Rep. 373. Since the publication of that decision it has been applied in the trial of similar issues, and it has been cited with approbation in this court in Mackinson v. Conlon, 55 N. J. Law, 566, 27 Atl. 930. In this respect there is no error in the charge of the trial court.[8] * * *

In my opinion, the judgment below should be reversed, and a venire de novo awarded.

[7] "Now, admitting that in the case of an independent chattel, a piece of furniture for example to be made under a special contract, and some term, which in itself amounted to a condition precedent, being unperformed, if the party for whom it was to be made had yet accepted it, an action might, upon obvious grounds, be maintained either on the special contract with a dispensation of the conditions alleged, or an implied contract to pay for it according to its value; it does not seem to us that there are any grounds from which the same conclusion can possibly follow in respect of a building to be erected, or repairs done, or alterations made, to a building on a man's own land, from the mere fact of his taking possession. Indeed the term 'taking possession' is scarcely a correct one. The owner of the land is never out of possession while the work is being done. But, using the term in a popular sense, what is he, under the supposed circumstances, to do? The contractor leaves an unfinished or ill constructed building on his land. He cannot, without expensive, it may be tedious, litigation, compel him to complete it according to the terms of his contract; what has been done may show his inability to complete it properly; the building may be very imperfect, or inconvenient, or the repairs very unsound; yet it may be essential to the owner to occupy the residence, if it be only to pull down and replace all that has been done before. How then does mere possession raise any inference of a waiver of the conditions precedent of the special contract, or of the entering into a new one? If indeed the defendant had done anything, coupled with the taking possession, which had prevented the performance of the special contract, as if he had forbidden the surveyor from entering to inspect the work, or if, the failure in complete performance being very slight, the defendant had used any language, or done any act, from which acquiescence on his part might have been reasonably inferred, the case would have been very different. Here there was nothing of that kind; the reliance of the plaintiff was simply on the defendant's possession." Per Lord Campbell, C. J., in Munro v. Butt (1858) 8 El. & Bl. 738, 120 Eng. Rep. 275.

See, to the same effect, Smith v. Brady (1858) 17 N. Y. 173, 72 Am. Dec. 442; Gove & Co. v. I. C. M. & M. Co. (1888) 16 Or. 93, 17 Pac. 740; Elliott v. Caldwell (1890) 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52; Mountain Terrace Land Co. v. Brewer & Jones (1910) 165 Ala. 242, 51 South. 559. Further authorities are collected in the notes in 16 L. R. A. (N. S.) 489, and 20 L. R. A. (N. S.) 873.

[8] In the following cases a recovery was denied where plaintiff showed part performance of a building contract falling short of substantial performance, even though it did not appear that plaintiff was guilty of a willful breach:

PINCHES v. SWEDISH EVANGELICAL LUTHERAN CHURCH.

(Supreme Court of Errors of Connecticut, 1887. 55 Conn. 183, 10 Atl. 264.)

Assumpsit upon counts for labor and material.

BEARDSLEY, J. The plaintiff claims to recover upon the counts for work and materials furnished in the erection of a church edifice for the defendants. A written contract was entered into by the parties, providing that the plaintiff should erect the edifice upon the land of the defendants, in accordance with certain plans and specifications. The plaintiff completed the building on the twenty-first day of January, 1885, when the defendants entered into the full possession and occupancy of the same. The building varies from the requirements of the contract in several material particulars. The ceiling is two feet lower, the windows are shorter and narrower, and the seats are narrower than the specifications require, and there are some other variations and omissions. The defect in the height of the ceiling is due to the combined error of the plaintiff and the defendants' architect. The other changes and omissions occurred through the inadvertence of the plaintiff and his workmen. The defendants knew of the change in the height of the ceiling when they took possession of the building, and of the changes in the windows and seats shortly afterwards, and objected to the changes as soon as they discovered them.

The plaintiff, in doing the work and furnishing the materials, acted in good faith, and the building, as completed, is reasonably adapted to the wants and requirements of the defendants, and its use is beneficial to them. It would be practically impossible to make the building conform to the contract without taking it partially down and rebuilding it. The defendants, upon the trial of the case, offered evidence to prove the amount it would cost to make the building conform to the contract; claiming that they were entitled to such sum as damages. The court excluded the evidence, and the only error assigned is the exclusion of that evidence. The defendants' claim rests upon the assumption that the liability of the plaintiff to damages is not affected by the fact that his deviation from the contract was unintentional, nor by the advantageous use of the building, but that it is the same as

Sumpter v. Hedges (1898) 1 Q. B. 673. (Plaintiff abandoned work after part performance for lack of money to complete the contract.) Poynter v. United States (1906) 41 Ct. Cl. 443. (Plaintiff became bankrupt and consequently was unable to complete performance of contract. The court laid stress on the entirety of the contract. The court's view that defendant received no benefit seems untenable.) Serber v. McLaughlin (1901) 97 Ill. App. 104. (Labor union called off plaintiff's men because a non-union carpenter in defendant's employ was working on the same building.) Presbyterian Church v. Hoopes A. S. C. & P. Co. (1887) 66 Md. 598, 8 Atl. 752. Riddell v. Peck-Williamson Heating & Ventilating Co. (1902) 27 Mont. 44, 69 Pac. 241. (Plaintiff forced to abandon contract after part performance because of lack of funds.) Smith v. Brady (1858) 17 N. Y. 173, 72 Am. Dec. 442.

it would have been if he had willfully departed from the contract, and they had rejected the building, and received no benefit from it.

The defendants' claim is undoubtedly supported by decisions of courts of eminent authority in England and this country, which hold that no recovery can be had for labor or materials furnished under a special contract, unless the contract has been performed, or its performance has been dispensed with by the other party.

The hardship of this rule upon the contractor who has undesignedly violated his contract, and the inequitable advantage it gives to the party who receives and retains the benefit of his labor and materials, has led to its qualification; and the weight of authority is now clearly in favor of allowing compensation for services rendered and materials furnished under a special contract, but not in entire conformity with it, provided that the deviation from the contract was not willful, and the other party has availed himself of and been benefited by such labor and materials,[9] and, as a general rule, the amount of such compensa-

[9] "It is well settled that one is not compelled to accept work which does not conform to the contract, and that no recovery can be had on the contract where the contractor has not complied with the specifications. * * * When, however, a building has been erected, though it does not comply with the contract and specifications, and the owner of the land has taken possession, a recovery can be had by the contractor on the quantum meruit. In the present case the structure was for a dwelling house. It was completed for that purpose, and was suitable for it, though not in compliance with the specifications. The defendant took possession of it in April, 1895. Before taking possession he notified the plaintiff in writing that he did not accept it as having been built in accordance with the contract, and that he would hold them responsible for all sums that it would cost to put it in shape to use. Having taken possession, and appropriated the material and labor of the plaintiff's which had gone into the building, the damages would be measured under the above rule." Eaton v. Gladwell (1899) 121 Mich. 444, 80 N. W. 292.

See, to the same effect, White v. Oliver (1853) 36 Me. 92; Katz v. Bedford (1888) 77 Cal. 319, 19 Pac. 523, 1 L. R. A. 826; Walstrom v. Oliver-Watts Const. Co. (1909) 161 Ala. 608, 50 South. 46. This doctrine prevails in most jurisdictions. The authorities are collected in Woodward, Quasi Contracts, § 175.

In Manitowoc Steam Boiler Works v. Manitowoc Glue Co. (1903) 120 Wis. 1, 97 N. W. 515, it was held that a use by defendant of a defective boiler after notice to plaintiff to perfect the same or to remove it cannot be deemed an acceptance. The court said: "Doubtless the fact, unexplained, that defendant made use of the boiler, which had been built into its boiler house and connected with the steam pipes in its factory, is an evidentiary circumstance having some tendency to show acceptance, but such conduct is by no means conclusive when a party cannot forego use of the appliance without at the same time giving up the use of his own premises. Thus one whose land has been plowed by another cannot be said to accept that plowing as a service merely because he sows seed and raises a crop on the land. Smith v. Brady, 17 N. Y. 188, 72 Am. Dec. 442. Nor because a city runs sewerage through filter beds at its sewer outlet does it necessarily accept them. Madison v. American Sanitary Engineering Co., 118 Wis. 480, 95 N. W. 1097. Nor because the owner lives in his house, and uses the defective furnace therein, does he necessarily accept the latter. Williams v. Thrall, 101 Wis. 337, 76 N. W. 599; Fuller Warren Co. v. Shurts, 95 Wis. 606, 70 N. W. 683. Nor because one takes his own logs does he accept the cutting and driving done upon them by another. McDonald v. Bryant, 73 Wis. 20, 26, 40 N. W. 665. In Smith v. Scott's Ridge School Dist., 20 Conn. 312, it was held sufficient to negative inference of acceptance of school house that the district had 'done nothing to prevent its removal by the builder.' See,

tion is to depend upon the extent of the benefit conferred, having reference to the contract price for the entire work. Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Smith v. First Cong. Meeting-House, 8 Pick. (Mass.) 178; Moulton v. McOwen, 103 Mass. 591; Dyer v. Jones, 8 Vt. 205; Kelly v. Town of Bradford, 33 Vt. 35; Corwin v. Wallace, 17 Iowa, 374; White v. Oliver, 36 Me. 92; Dermott v. Jones, 23 How. 220, 16 L. Ed. 442; Smith v. School-District, 20 Conn. 312; Blakeslee v. Holt, 42 Conn. 226; Lucas v. Godwin, 3 Bing. N. C. 773; Chit. Cont. 569; 2 Greenl. Ev. § 104; Pars. Cont. 523, note 1. In cases where only some additions to the work are required to finish it according to the contract, or where, as in the case of Blakeslee v. Holt, the defects in it may be remedied at a reasonable expense, it seems proper to deduct from the contract price the sum which it would cost to complete it, as was done in that case.

In the present case the result of the plaintiff's labor and materials is a structure adapted to the purpose for which it was built, and of which the defendants are in the use and enjoyment, but which cannot be made to conform to the special contract, except by an expenditure which would probably deprive the plaintiff of any compensation for his labor.

also, Bozarth v Dudley, 44 N. J. Law, 304, 43 Am. Rep. 373. From such considerations it is clear that the mere use of this boiler in connection with its own premises, with which it had been connected, is not enough to overcome the foregoing evidence that defendant up to the time of the trial had elected not to accept or retain the boiler, but wished it removed, and that plaintiff fully understood such election, and had allowed said boiler to remain in breach of its agreement to remove it, because of an erroneous construction of the contract."

See, also, Gwinnup v. Shies (1903) 161 Ind. 500, 69 N. E. 158. (Plaintiff's use of a defective sidewalk laid on his land not an acceptance.) Mountain Terrace Land Co. v. Brewer (1910) 165 Ala. 242, 51 South. 559. (Similar facts to those in preceding case.) Manning v. School District No. 6 of Ft. Atkinson (1905) 124 Wis. 84, 102 N. W. 356. (Use by defendant of defective heating plant installed by plaintiff held not an acceptance.)

In Blackburn v. Texarkana Gas & Electric Co. (1912) 102 Ark. 152, 143 S. W. 588, the plaintiff drove a well on defendant's land, but at the stipulated depth the flow of water was less than half that called for by the contract. Held, that plaintiff could recover nothing, since there was no acceptance by defendant.

On the other hand, some courts hold that if the structure erected in good faith, but not in conformity with the contract, in fact increases the value of defendant's land, and is used by defendant, a duty to compensate the contractor arises, independently of any election by the landowner to accept. Yeats v. Ballentine (1874) 56 Mo. 530. (Plaintiff installed in defendant's house certain plumbing which did not conform to the specifications. "This idea of acceptance as a waiver, is not the ground upon which courts have allowed recovery on a quantum meruit count. It is because the work is of value to the proprietor.") Kelly v. Town of Bradford (1860) 33 Vt. 35. (Contractor, employed to build a road and a bridge, in good faith departed in certain particulars from stipulation of his contract. Held, he might recover on a quantum meruit, since the contract could not be rescinded, and from its nature plaintiff's labor must inure to the benefit of defendant.) See, also, Bertrand v. Byrd (1844) 5 Ark. 651.

We think that the court below properly deducted from the contract price the amount of the diminution in the value of the building by reason of the plaintiff's deviation from the contract. There is no error.

PARK, C. J., and CARPENTER, J., concurred. PARDEE and LOOMIS, JJ., dissented.[10]

McGONIGLE v. KLEIN.

(Court of Appeals of Colorado, 1895. 6 Colo. App. 306, 40 Pac. 465.)

Error to district court, Pueblo county.

Action by Henry Klein against James A. McGonigle and Charles E. Gast to recover on a quantum meruit for services performed under a contract with McGonigle and to enforce a lien against the property of Gast. From a judgment for plaintiff, defendants bring error.

Charles E. Gast entered into a contract with McGonigle by which the latter agreed to build for the former a residence according to plans

[10] In Elliott v. Caldwell (1890) 43 Minn. 357, 45 N. W. 845, 9 L. R. A. 52, it was held that a contractor who fraudulently conspired with defendant's supervisor (architect) to permit the use of inferior material of a sort substantially different from that called for by the contract could recover nothing for his partial performance of the contract.

MEASURE OF DAMAGES.—"It was and is the contention of counsel for defendant that these questions were proper, and that the measure of damages which should be permitted, under the circumstances here stated, is what the building was reasonably worth as defendant took possession of it, not exceeding the contract price, less what it would reasonably cost to complete it and make it comply with the contract and specifications. On the other hand, counsel for plaintiffs contend that the proper measure of damages in a case like the present is the value of the building as it is, not exceeding the contract price, less the difference in its value as it now stands and as it would be were it such a building as contracted for; that, to this difference in value to be deducted in the case at bar, there should be added the damage suffered by the defendant by reason of the delay, if any, in constructing the building, and the net result would be the measure of recovery. The court below stated the rule as to the measure of damages substantially as it is claimed by counsel for plaintiffs. While it is apparent that the rule claimed by counsel for plaintiffs and as given by the court is not the correct rule, the defendant had no reason to complain of it. It gave him a greater amount of damages than he was entitled to. In fact, it gave him double damages; that is, under it he could take the building erected at its then value, not exceeding the contract price, deducting from that value the difference between such value and what it would be worth if it had been such a building as contracted for. The true rule to be applied in a case like the present, where it appears that at the time the plaintiffs took possession the building could not be made to comply with the contract without its entire demolition, and was of less value than the one contracted for, is the value of the building as so completed, not exceeding the contract price, less the damages sustained by the defendant by reason of plaintiffs' failure to perform their contract." Eaton v. Gladwell (1899) 121 Mich. 444, 80 N. W. 292. There is much diversity of authority as to the proper measure of damages where a contractor who has not fully performed his contract sues on the common counts. The foregoing extract states the three views which have been advanced, and adopts the view which has the support of the weight of authority. See Woodward, Quasi Contracts, § 178; 1 Columbia Law Review, 324.

of architects, as cheaply as it could be well constructed; he to receive as compensation 10 per cent. upon the cost of the building, Gast to pay the bills and contracts of McGonigle. The contractor, McGonigle, and Klein, the defendant in error, as a subcontractor, entered into a written contract whereby Klein agreed in consideration of $1,155 to perform all labor and furnish all material to construct the galvanized iron cornices, ventilators, skylight, gutters, oriel window, and slate roofings on Gast's residence. All the work was to be completed in twenty-six working days from the time the building was ready. Time to be extended only in case of a general strike. Klein was to be paid on the certificates of the architects as the work progressed. Klein commenced work, but did not properly prosecute it with an adequate force of laborers. The time for the completion of the contract expired, also additional time passed, and the work was neither completed nor vigorously prosecuted. These delays retarded the other parts of the work on the house, and such work as Klein did was not done in a good and workmanlike manner. Klein was notified by McGonigle several times that he (McGonigle) would have to put on men to do the work if he (Klein) did not proceed faster. Finally, after several warnings, McGonigle himself put additional slaters on the work. Klein then abandoned the work entirely with his men and tools, saying that he would not continue his work unless Gast paid the new men at his own expense, amounting to $65, which Gast declined to do. $650 had been paid on account of the contract, which would have left, had the contract been completed, $505. Klein claimed on a quantum meruit, for labor performed, $1,075; brought suit for $425 against McGonigle and Gast; and filed a petition for a lien upon the building against Gast for the same sum. Gast completed the Klein contract work at an expense of $192 in excess of the contract price with Klein. McGonigle and Gast filed answers setting up the facts, alleging nonfulfilment and abandonment of the contract by Klein, and Gast filed a cross complaint for the excess of $192.

The case was tried by the court without a jury. The court held that the plaintiff could recover on a quantum meruit, gave judgment against McGonigle for $166, and decreed a lien against the property of Gast for the same amount. Both parties appeal to this court.

REED, P. J.[11] The court erred in holding that a recovery could be had upon a quantum meruit for a part of the contract work. The contract was in writing, entire. In order to entitle the plaintiff to recover at all he must have shown either performance or that the contract had been rescinded or that the performance was rendered impossible by the wrongful acts and conduct of the defendants. On establishing either of the two latter facts, a quantum meruit recovery could have been had, not otherwise. Neither of these propositions was established by the evidence. Klein having failed to prosecute his work and com-

[11] The statement of facts is an abridgment of that contained in the Pacific Reporter.

plete it according to the terms of the contract, and giving as a reason his inability to get skilled mechanics, made the employment of the extra men by the owner a necessity. The act of employment was not rescission on the part of the owner nor legal cause for rescission by the contractor. The wages of the men employed, or the excess over the prices paid by the contractor, were trifling, and could have been readily adjusted. Klein's contention was that Gast should pay the entire wages, without cost to him, while he should receive the benefit of their labor. Upon the refusal of Gast, he abandoned and withdrew. The claim of Klein was trivial, technical, and inequitable.

The key to the whole matter appears in the testimony of Klein. He said, "I took the whole job at $1,155, and very soon discovered that I had taken it too low;" and it is evident, from all the evidence in the case, that he was seeking some legal excuse for abrogating the contract. The entire testimony shows that Gast did not wish or consider the contract of Klein at an end, but insisted upon its performance, and that what was done in securing help was to assist in its completion when Klein had frequently stated his inability to secure men. The authorities are conclusive and unanimous that, under the circumstances of this case, no recovery upon a quantum meruit or decree of a lien could have been had. 2 Pars. Cont. §§ 678, 679; Davis v. Hubbard, 41 Wis. 408; Bloomer v. Bernstein, L. R. 9 C. P. 588; Morgan v. Bain, L. R. 10 C. P. 15; Malbon v. Birney, 11 Wis. 107; Palm v. Railroad Co., 18 Ill. 217; Sickels v. Pattison, 14 Wend. (N. Y.) 257, 28 Am. Dec. 527; Phelps v. Sheldon, 13 Pick. (Mass.) 50, 23 Am. Dec. 659; Planche v. Colburn, 8 Bing. 14; Goodman v. Pocock, 15 O. B. 576; U. S. v. Behan, 110 U. S. 339, 4 Sup. Ct. 81, 28 L. Ed. 168. That there could be no lien decreed, see Kinney v. Sherman, 28 Ill. 520; Bank v. Dashiell, 25 Grat. (Va.) 616; Vail v. Meyer, 71 Ind. 159; Grogan v. Mayor, etc., of N. Y., 2 E. D. Smith, 693. It is evident that the court misapprehended the law controlling the case, and the judgment and decree of a lien against the property must be reversed. I am clearly of the opinion that Gast was, under the evidence, entitled to a judgment upon his cross complaint for the damages shown to have been sustained by the failure of Klein to perform his contract.

The judgment and decree reversed. Reversed.[12]

[12] **Accord:** Jennings v. Camp (1816) 13 Johns. (N. Y.) 94, 7 Am. Dec. 367; Wooten v. Reed (1844) 2 Smedes & M. (Miss.) 585; Gill v. Vogler (1879) 52 Md. 663; Hartman v. Meighan (1895) 171 Pa. 46, 33 Atl. 123; Douglas v. City of Lowell (1907) 194 Mass. 268, 80 N. E. 510; Lynip v. Alturas School Dist. of Modoc County (1914) 24 Cal. App. 426, 141 Pac. 835; Maxwell & Delehomme v. Moore (1909) 163 Ala. 490, 50 South. 882.

In Jennings v. Camp, supra, Spencer, J., said: "The point is whether a party who enters into a contract, and performs part of it, and then, without cause, or the agreement or fault of the other party, but of his own volition, abandons the performance, can maintain an action on an implied assumpsit for labor actually performed; and it seems to me that the mere statement of the case shows the illegality and injustice of the claim."

In Hartman v. Meighan, supra, Sterrett, C. J., said: "We are not aware

KETCHUM v. EVERTSON.

(Supreme Court of New York, 1816. 13 Johns. 359, 7 Am. Dec. 384.)

This was an action of assumpsit. The declaration contained the usual money counts, and a count upon an insimul computassent.

On the 8th of March, 1811, the parties at Poughkeepsie entered into a written agreement, by which the defendant contracted to sell to the plaintiffs a place called "the Four Corners, in the town of Washington, and the lands included in a mortgage given by Ebenezer Haight to Nehemiah Rogers and Daniel R. Lambert, dated the 18th of June, 1809," for the consideration of $6,000, part of which, viz. $700, was to be paid on the 1st day of May, ensuing the date of agreement, and the residue of the purchase money, over the sum of $4,000, to be secured by a mortgage, by the plaintiffs, to Rogers and Lambert, to be paid in three annual instalments, and the residue, to wit, the sum of $4,000, due to the heirs of Nicholas Evertson, deceased, either to remain under the mortgage, then existing, or a new mortgage to be given by the plaintiffs, as the defendant should elect; the whole business to be transacted, and the defendant to give a deed of the premises to the plaintiffs on the 1st day of May, then next, at the office of Rudd and Evertson, in Poughkeepsie.

The plaintiffs entered into possession of the premises under this agreement. On the first of May, 1811, a quit-claim deed for the premises, to the plaintiffs, executed by the defendant, but not by his wife, was left at the office of Rudd and Evertson, in Poughkeepsie, ready to be delivered to the plaintiffs, who did not call for it until in the month of October, following, when Ketchum requested the defendant to give up the contract, observing that his partner, Sweet, had failed; but the defendant refused to rescind the agreement. Ketchum then objected that the deed was a mere quit-claim, and did not contain the usual covenants of seisin, etc., or warranty, nor was it signed by the wife of the defendant. The defendant said the boundaries were according to the mortgage of Rogers and Lambert, under which the plaintiffs had purchased, that the deed was pursuant to the agreement, and the only one he intended to give; and having performed every thing he was bound to do by the contract, he should not give it up; but that he was willing to rectify any mistake about the boundary. Ketchum then tendered a deed to the defendant, with covenants and warranty, who refused to execute it. Ketchum then said he considered the contract as at an end,

that it has ever been recognized as a sound principle of the law of contracts that a plaintiff who has willfully defaulted in the substantial performance of an entire contract may, nevertheless, recover to the extent of his part performance."

Contra (in accordance with the rule of Britton v. Turner, page 413, infra): McClay v. Hedge (1864) 18 Iowa, 66; McKinney v. Springer (1851) 3 Ind. 59, 54 Am. Dec. 470; Lee v. Ashbrook (1851) 14 Mo. 378, 55 Am. Dec. 110; McKnight v. Bertram Heating & Plumbing Co. (1902) 65 Kan. 859, 70 Pac. 345; Sheldon v. Leahy (1896) 111 Mich. 29, 69 N. W. 76.

and demanded the $700, which, it appeared, had been paid by the plaintiffs, on the 8th of May, 1811, and was applied to pay the interest on the mortgage to N. Evertson, and the costs due to the attorneys of Rogers and Lambert. The plaintiffs quitted the premises in February following, and in March the keys were tendered to the defendant, who refused to take them.

In 1813, the defendant sold the premises to Stephen Allen, for the consideration of $4,560, by a quit-claim deed.

The judge was of opinion that the plaintiffs were entitled to recover. The jury found a verdict for the plaintiffs for the $700 and interest. A motion was made to set aside the verdict and for a new trial.

SPENCER, J.,[13] delivered the opinion of the Court. The plaintiffs seek to recover of the defendant $700, paid upon a contract for the conveyance of a farm; and it is contended, that the defendant has violated the contract in several respects: 1st. In this, that the deed executed by the defendant contains no covenants of warranty; 2d. That the defendant's wife has not executed and acknowledged the deed; and, 3d. That the boundaries specified in the deed do not embrace all the lands constituting the farm at the Four Corners.[14] * * *

The defendant, then, has complied with his agreement in all respects; and yet the plaintiffs, who have paid 700 dollars on the contract, and have totally refused to perform their part of the contract by accepting the deed, and giving a mortgage, seek to recover back the money thus paid, on the ground that the defendant has sold the farm, and thus rescinded the contract.

Where there is no agreement subsisting between the parties, but the same has been put an end to, by the election or refusal of the defendant to perform it, in general, the other party may recover back any money paid by him in part performance. This was so decided in Raymond and others v. Bearnard, 12 Johns. 274, 7 Am. Dec. 317.

It may be asserted, with confidence, that a party who has advanced money, or done an act in part performance of an agreement, and then stops short, and refuses to proceed to the ultimate conclusion of the agreement, the other party being ready and willing to proceed and fulfil all his stipulations, according to the contract, has never been suffered to recover for what has been thus advanced, or done. The plaintiffs are seeking to recover the money advanced on a contract, every part of which the defendant has performed, as far as he could by his own acts, when they have voluntarily and causelessly refused to proceed, and thus have, themselves, rescinded the contract.

It would be an alarming doctrine, to hold, that the plaintiffs might violate the contract, and, because they chose to do so, make their own

[13] The statement of facts is abridged and a portion of the opinion is omitted.

[14] The court held that the quit-claim deed executed by defendant and left at the office of Rudd and Evertson to be delivered to plaintiffs conformed to the terms of the contract between them.

infraction of the agreement the basis of an action for money had and received. Every man who makes a bad bargain, and has advanced money upon it, would have the same right to recover it back that the plaintiffs have. The defendant's subsequent sale of the land does not alter the case; the plaintiffs had not only abandoned the possession, but expressly refused to proceed, and renounced the contract. To say that the subsequent sale of the land gives a right to the plaintiffs to recover back the money paid on the contract, would, in effect, be saying, that the defendant could never sell it, without subjecting himself to an action by the plaintiffs. Why should he not sell? The plaintiffs renounced the contract, and peremptorily refused to fulfil it; it was in vain, therefore, to keep the land for them. The plaintiffs cannot, by their own wrongful act, impose upon the defendant the necessity of retaining property which his exigencies may require him to sell; this would be most unreasonable and unjust, and is not sanctioned by any principle of law.

There must be a new trial, with costs to abide the event of the suit. New trial granted.[15]

POSEY v. GARTH.

(Supreme Court of Missouri, 1841. 7 Mo. 94, 37 Am. Dec. 183.)

Appeal from the Howard Circuit Court.

SCOTT, J. Bird Posey was employed by Dabney Garth, as overseer, for one year, at the price of one hundred and seventy-five dollars; his term of service commenced on the 1st January, 1838, and he continued industriously employed for Garth until some time in April following, when Garth told Posey that he must leave his service, that he had been negligent, and had maltreated and injured his negroes: thereupon Posey left Garth's employment. It appears that Posey, the day before he was ordered to leave Garth's service, for some fault supposed to have been committed by one of Garth's negroes under his control, attempted to punish the negro by whipping; the negro, the bill of exceptions states, resisted by refusing to obey Posey's order. Posey thereupon struck the negro with a handspike and knocked him down, and then beat him with the handspike in such a manner that in four days thereafter he died from the effect of the blows. Posey afterwards instituted an action against Garth for his year's wages, claiming the whole amount, and recovered sixty-one dollars, the costs being adjudged against him. A new trial was asked for by Posey, and refused, and he brings this cause here by appeal. Under this state of facts is he aggrieved by the judgment of the court below?

[15] Accord: Downey v. Riggs (1897) 102 Iowa, 88, 70 N. W. 1091; Hillyard v. Banchor (1911) 85 Kan. 516, 118 Pac. 67; Sanders v. Brock (1911) 230 Pa. 609, 79 Atl. 772, 35 L. R. A. (N. S.) 532 (with note collecting authorities).

Contra: Giles v. Gullion (1859) 13 Ind. 487; Michigan Yacht Co. v. Busch (1906) 143 Fed. 929, 75 C. C. A. 109.

If a person retain a servant for a year at wages, the performance of the service is a condition precedent to the payment of wages, and the servant cannot recover them before he has performed the year's service. If he is prevented by his employer from fulfilling his contract, and is wantonly and without sufficient cause discharged before the expiration of the period for which he was hired, he is entitled to the wages for the whole period he was to serve: but if there is any fault or misconduct in him toward his employer sufficient to warrant his discharge, and in consequence thereof he is driven from the service of the person by whom he is hired, he is not entitled to any wages. Reciprocal justice requires that such should be the law of contracts of this character; if it were otherwise, then while the employer is bound by his contract to retain the servant, although it may be against his inclination, for the whole period of his service, or pay him the whole wages, the servant by his misconduct may compel his employer for his own security to discharge him, and then recover the wages for the term he has served. So, while the contract is binding on the employer, the servant is bound or not, at his option. Such a construction of the contract would encourage fraud and wickedness in servants, and induce them, whenever their inclination prompts, to be guilty of such enormities as will compel their discharge.

Justice Lawrence remarked, in the case of Cutter v. Powell, 6 Term R. 327, that a servant, although hired in a general way, is considered to be hired with reference to the general understanding on the subject, that the servant shall be entitled to his wages for the time, though he does not continue in the service during the whole year. This remark of the learned judge torn from its context and placed in some elementary works, has been made to give countenance to the idea, that if there is a termination of the service by the fault of the servant before the time agreed on, the servant is entitled to wages for the time he served, when it is obvious the judge was speaking of the termination of the contract without the fault of the servant, for it is observable that this principle was stated in a case which the court unanimously held, that if a sailor hired for a voyage, take a promissory note from his employer for a certain sum provided he proceed, continue and do his duty on board for the voyage, and before the arrival of the ship, he dies, no wages can be claimed either on the contract or on a quantum meruit. This case however was decided on the peculiar nature of the contract, and is not to be regarded as an authority in support of the doctrine, that if a servant who is hired for a year die in the middle of it, his executor cannot recover part of his wages in proportion to the time of service. This was the old law, it is otherwise now.

Was the conduct of Posey such as to warrant his discharge? Have mercy and humanity left this earth, that this question should be asked? Could Garth, as a master, owing protection to his slaves, any longer retain such a man in his service? He not only had a right to discharge him, but it was his duty to do it. A mere disobedience of orders seems

to have been the fault of the negro; for although the record states that the negro resisted, yet it appears that his resistance consisted in disobeying orders, and that, too, when he was about to be whipped. Should one retain in his employment another who, for such a provocation, would with a handspike knock down his slave, and then continue his blows until they caused his death?

As it regards the question of costs, inasmuch as the plaintiff was not entitled to recover anything, he cannot complain that they were adjudged against him, and as the defendant does not seek to reverse the judgment, let it be affirmed.[16]

BYRD v. BOYD.

(Court of Appeals of South Carolina, 1827. 4 McCord, 246, 17 Am. Dec. 740.)

The plaintiff brought suit against the defendant, on a written contract for wages for one year, as overseer. The contract was for $180 for the year. The plaintiff managed the crop well, but in July he made use of abusive language to the defendant's daughter, for which he was turned away.

Huger, J., who tried the cause, charged the jury that the contract was entire for the year; that if the plaintiff had been properly turned away he ought to recover nothing. If the defendant had turned him off improperly the plaintiff ought to recover the whole amount.

The jury found a verdict in favor of the plaintiff for the whole amount of the year's wages. The defendant appealed.

JOHNSON, J. The only ground necessary to be considered in this case is the supposed misdirection of the presiding judge in charging the jury that they were not at liberty under any circumstances to apportion the compensation of the plaintiff to the services actually rendered, and that they were bound to allow him the stipulated wages for the year or nothing. I have found it very difficult to reconcile the cases on this subject, or to extract from them any satisfactory and well defined rule. The English cases go very far in establishing

[16] Accord: Spain v. Arnott (1817) 2 Starkie, 256, 3 E. C. L. R. 400 (plaintiff discharged for willful disobedience); Turner v. Robinson (1833) 5 B. & Ad. 789 (plaintiff discharged for disloyal conduct); Prescott v. White (1886) 18 Ill. App. 322 (plaintiff discharged for defrauding his employer); Peterson v. Mayer (1891) 46 Minn. 468, 49 N. W. 245, 13 L. R. A. 72 (plaintiff discharged for embezzlement); Von Heyne v. Tompkins (1903) 89 Minn. 77, 93 N. W. 901, 5 L. R. A. (N. S.) 524 (plaintiff discharged for unfaithfulness and disobedience); Huntingdon v. Claffin (1868) 38 N. Y. 182 (plaintiff discharged for intoxication, incapacitating him for service); Lane v. Phillips (1859) 51 N. C. 455 (plaintiff discharged for willful disobedience); Pullen v. Green (1876) 75 N. C. 215 (plaintiff discharged for negligence in the performance of his duties as a clerk); Hartman v. Rogers (1886) 69 Cal. 643, 11 Pac. 581 (plaintiff discharged "for good cause"); Beach v. Mullin (1870) 34 N. J. Law, 343 (plaintiff discharged for insolence and willful disobedience of orders). See, also, Allen v. Aylesworth (1899) 58 N. J. Eq. 349, 44 Atl. 178 (plaintiffs guilty of breach of faith).

that contracts particularly with servants and seamen cannot be apportioned, and that the performance of the service is a condition precedent to the payment of wages, and they result in the rule, that when they are prevented from performing it by the misconduct of the master, they are entitled to the stipulated wages for the whole time, and e converso, they are entitled to nothing if they abandon the service voluntarily. And yet the rule has been so far relaxed as to entitle the master to a deduction of any sum which a seaman may have earned in another vessel in the meantime. Abbott, 392; 1 Com. on Cont. 362. This rule is evidently the result of expediency, especially as applied to seamen; and it becomes a question of some importance how far it is applicable to the subject under consideration. The relation of employer and overseer, is one which the state of the country renders almost indispensably necessary to every planter, and collisions do and must necessarily arise, and it is fit that there should be some settled rule on the subject. When the employer wantonly and without cause turns off his overseer, at a season of the year when it would be impracticable to get employment elsewhere, and his time is wholly lost, I should feel no hesitation in inforcing the rule rigidly, not only as a punishment but as a just remuneration to the overseer; and so when the overseer abandons the employer without cause, or by his neglect inflicts a loss on him commensurate with the services which he has performed, he clearly deserves no compensation.

There is, however, a third class of cases for which it is necessary to provide, and which are perhaps of the most common occurrence. They are those where the employer reaps the full benefit of the services which have been rendered, but some circumstance occurs which renders his discharging the overseer necessary and justifiable, and that perhaps not immediately connected with the contract, as in the present case. It happens frequently too that it becomes a question of great difficulty to ascertain with whom the first wrong commenced. I cannot reconcile it to my notions of natural justice, that the overseer should not recover a compensation for the services, so far as they were directed, and which have been beneficial to the employer. And I am unable to discover any evil which is likely to result from submitting such a matter to the sound discretion of a jury of the country. And as a matter of expediency I should be disposed to establish it as a rule. This conclusion is I think supported by the principle of the exception before noticed, and by the common case in which a party is permitted to prove by way of defence, that owing to some defect in the execution of work and labor done and performed, the thing is not worth so much as was stipulated for; and the still more comprehensive principle, that a partial failure of consideration is a good ground of defence. Cases of this description are of very frequent occurrence, and although this question has never been judicially determined, it may be clearly collected from them, that the prevailing opinion is favorable to an apportionment. In some cases the jury have found

the entire sum, but in most they have apportioned it when the circumstances justified it. Yet the point has never been adverted to by the bench or the bar, (vide Davis v. Crawford, 2 Mill, Const. 403, 12 Am. Dec. 682, Clancey v. Robertson, 2 Mill, Const. 404, and Connelly v. Irby,) except in the case of Adams v. Cox, 1 Nott & McC. 284, which is relied on in opposition to the motion. But by referring to that case, it will be found that the question was not made, nor is there even a dictum in relation to it.

I am of opinion, therefore, that the case should go back on the ground of misdirection, unbiased by any opinion of the court as to the facts, and it is ordered accordingly. New trial granted.[17]

LINDNER v. CAPE BREWERY & ICE CO.

(St. Louis Court of Appeals. Missouri, 1908. 131 Mo. App. 680, 111 S. W. 600.)

Appeal from Cape Girardeau Court of Common Pleas; Benj. F. Davis, Judge.

Action by Andreas Lindner against the Cape Brewery & Ice Company. From a judgment for plaintiff, defendant appeals.

GOODE, J.[18] By a contract entered into January 2, 1905, plaintiff engaged for service in defendant's brewery. The contract was in writing and its terms are clear. Plaintiff agreed to continue in the employ of defendant for two years from the date of the instrument at defendant's brewery in the city of Cape Girardeau, perform therein the duties of brewmaster and act as foreman of the bottling department, diligently serve defendant in such other business as its manager might direct, and carry out the directions of said manager in the per-

[17] Accord: Hariston v. Sale (1846) 6 Smedes & M. (Miss.) 634 (overseer of plantation); Robinson v. Sanders (1852) 24 Miss. 391 (overseer of plantation); Massey v. Taylor (1868) 5 Cold. (Tenn.) 447, 98 Am. Dec. 429; Congregation of Children of Israel v. Peres (1866) 2 Cold. (Tenn.) 620.

The more recent decisions allowing a servant discharged for cause to recover on quantum meruit for the value of his performance permit defendant to offset his damages resulting from plaintiff's misconduct. Newman v. Reagan (1879) 63 Ga. 755; Newman v. Reagan (1880) 65 Ga. 512; Hildebrand v. American Fine Art Co. (1901) 109 Wis. 171, 85 N. W. 268, 53 L. R. A. 826; Peacock v. Coltrane (1907) 44 Tex. Civ. App. 530, 99 S. W. 107; Fuqua v. Massie (1894) 95 Ky. 387, 25 S. W. 875.

But see contra, if servant's breach is the result of ignorance or incompetence rather than a willful default. Lawrence v. Gullifer (1854) 38 Me. 532.

In Shute & Limont v. McVitie (1903, Tex. Civ. App.) 72 S. W. 433, where the branch office, to take charge of which defendant employed plaintiff, was conducted at a loss, it was held that the measure of recovery by plaintiff, who was discharged for cause, was the value of his services, less defendant's damages occasioned by plaintiff's breach, and not the actual benefit accruing to defendant from such services, and thus the fact that no money was earned by plaintiff's employers by his labor was immaterial. Compare Hedges v. Slaughter (1910, Tex. Civ. App.) 130 S. W. 592; Fabian v. Wasatch Orchard Co., page 331, supra.

[18] The statement of facts contained in the opinion is abridged and portions of the opinion proper are omitted.

formance of all services. * * * In consideration of those things defendant bound itself to pay plaintiff $3,000 a year as follows: One hundred dollars on the first and sixteenth days of each month during the existence of the contract, and $600 on the second days of January, 1906 and 1907.

Plaintiff worked under the contract without serious dispute with defendant or its other employés until September 1, 1906, and was paid for his services to that date. He had been somewhat rough in his speech to the employés in the bottling department, but no open rupture between plaintiff and any of them occurred until about September 13th. On said day he observed in said department a few bottles which had been washed but not thoroughly cleansed, as he thought, and spoke about their condition to an employé named Kimmick, who was called the "first man" in the department, at the same time applying an offensive epithet to Kimmick. The latter said it was impossible to wash the bottles clean and make 18 barrels of beer a day; meaning the brewing was pushed beyond the capacity of the men. A few words passed and plaintiff told Kimmick to go to the office and get his time; in fact, paid him and laid him off from work. This was early in the forenoon, and at the time William H. Coerver, the president and general manager of the brewery, was attending to business elsewhere in the city. The employés of the building belonged to a trade union, and at noon they notified the general manager they would all quit work if Kimmick was discharged. It should be stated plaintiff had power to suspend any employé, but the final decision as to whether the suspension should stand or not rested with Coerver. * * *

Coerver reinstated Kimmick, and refused to let plaintiff hire a new first man for the bottling department. After these occurrences plaintiff refused to enter said department of the brewery or to act as superintendent of the men there, though he says he was willing to do so if Kimmick would come to him and agree to obey his orders. * * * On Saturday, September 15th, Coerver got the board of directors together and an attempt was then made to bring about a settlement; but the men persisted in saying they would quit work if Kimmick was not allowed to remain, and plaintiff refused to have anything to do with the bottling department unless Kimmick was dismissed. Finally the directors treated plaintiff's conduct as a refusal to perform part of his contract of service, and on Monday, September 17th, when he returned to the brewery, Coerver offered him a check for $525, telling him the directors had decided to ask for his resignation. Plaintiff refused to resign or take the check and Coerver told him if he would not accept the check he would get nothing. * * *

This action was instituted to recover $1,400 alleged to be due under the contract; that is to say, $100 every two weeks from September 1st to January 1st, and $600 which would fall due January 2d. The petition states the terms of the contract, and alleges plaintiff complied with it in every particular, but defendant failed to comply, by dis-

charging him, demanding he leave the premises and not return. The answer admits the execution of the contract, denies plaintiff complied with its provisions, that he served defendant faithfully, that he was discharged, was ready and willing to continue his work, or offered to do so. A counterclaim was also preferred, based on plaintiff's refusal to perform his duties. * * * A verdict was returned for plaintiff for $1,400 without a finding on the counterclaim and defendant appealed.

Plaintiff's own version of the events leading up to the cessation of his services shows he refused to perform an essential part of his contract obligation. He was employed to act as superintendent of the bottling department, as well as brewmaster. * * * The refusal of plaintiff to resume his place and duties as superintendent of the bottling department on the repeated requests of Coerver clearly breached the contract.

It is insisted this breach was not of so serious a nature as to justify plaintiff's dismissal; but we think it was. Plaintiff had obligated himself to superintend the bottling, and this was as substantial a part of his employment as was his undertaking to act as brewmaster. It went to the entire consideration to be paid for his services, and was meant by both parties to be an essential part of the agreement. Hence it cannot be treated as an independent covenant, for breach of which defendant might seek damages, but could not terminate the employment. Ritchie v. Atkinson, 10 East, 306; Lake Shore, etc., R. R. v. Richards, 152 Ill. 59, 38 N. E. 773, 30 L. R. A. 33, and notes; Springfield Seed Co. v. Walt, 94 Mo. App. 76, 67 S. W. 938. It is a plain instance of a dependent and indivisible covenant by any criterion laid down in the books. Disobedience of orders by a servant, and failure to perform the work for which he was employed, is good ground for his dismissal. Cramer v. Mack, 8 Mo. App. 531; McCain v. Desnoyers, 64 Mo. App. 66; Jordan v. Moulding Co., 77 Mo. App. 572; Wood, Master & Servant, § 119; 26 Cyc. 990, 993. Plaintiff's conduct was perverse and unreasonable, and deprived the company of one of the main services it had engaged him to render. Hence we hold he was justly dismissed, and is not entitled to his salary for the period subsequent to the dismissal.

The question of difficulty arises on his right to recover for the time he had served which had not been paid for up to the date of the discharge. The contract was for services to be rendered during the period of two years, and was, in this respect, an entirety. The rule of law controlling the right of a party to recover for what he has done under a contract entire in its nature, and not fully performed, is infected with technicalities, discord, and injustice. The courts have long deplored this fact and, in some jurisdictions, have struggled clear of technical rules and established the doctrine that when a servant is discharged for misconduct he can recover the value of services rendered prior to the discharge, not exceeding the contract price, and diminished by what the master has lost from his wrongdoing. Wood, Master &

Servant, § 129; 26 Cyc. 1045, and cases cited in note 48. In Missouri, if one contracts to erect a house and does not finish the job, but proceeds far enough toward performance to benefit the owner, the contractor may recover, quantum meruit, the value of his work (Yeats v. Ballentine, 56 Mo. 530); but building contracts are treated as exceptions to the general rule.

Hardships must arise from applying, in a Procrustean way, the doctrine that no recovery can be had without full performance, to cases of continuous service wherein a partial performance suffices to confer a substantial benefit on the promisee, as well as to cases in which no benefit can be conferred without complete performance. If a man hired by a farmer for the year remains at work long enough to put in a crop for the employer, and then quits, his equity to be paid for his work rests on firmer ground than does, say, the claim of an artist who engages to paint a portrait, and throws up the task when it is half finished. A stern rule has been enforced by the courts of this state in cases like the present from the first decision on the question, and employés who were discharged for cause, or abandoned work before the end of their term of employment, have been denied recovery either for the period during which they had served, or for the remainder of the term. Posey v. Garth, 7 Mo. 94, 37 Am. Dec. 183; Caldwell v. Dickson, 17 Mo. 575; Schnerr v. Lemp, 19 Mo. 40; Henson v. Hampton, 32 Mo. 408; Lambert v. Hartshorne, 65 Mo. 549; Earp v. Tyler, 73 Mo. 617. Of those cases Posey v. Garth is exactly in point, as the facts were that Posey, who was hired for a year by Garth at an annual wage, was discharged for misconduct before the year ended, and was paid nothing for his work, which had continued several months. He sued on the contract, and was refused redress in an opinion which declared the law as it has been followed ever since; namely, if a person enters service for a year for a stipulated wage, performance of the whole contract is a condition precedent to payment and the servant cannot recover if he does not serve throughout the year. If he is discharged without sufficient cause before the year expires, he is entitled to wages for the whole year; but if there is any fault or misconduct toward his employer sufficient to warrant his dismissal, and, in consequence, he is dismissed, he is not entitled to any wages.

This doctrine is maintained on the ground that to permit a recovery by a servant who is discharged for good cause, or abandons his job without cause, will encourage breaches of contracts. This reasoning is good in instances where the servant wantonly abandons his contract, but may be pushed so far as to become unjust. Various events beyond the servant's control, such as sickness in his family, or a misunderstanding in which he was technically wrong but free from moral turpitude, may cause him to fall short of complete performance. The frequent inequity of permitting an employer to retain the benefit of work done by a servant while the latter goes unrewarded has caused courts which accept the doctrine prevailing in this state to allow an exception when the contract of hiring, though for a definite period

and a round sum, provides for payment of the compensation in periodical installments. In such cases, the rule in some jurisdictions is that a servant who abandons his contract or is discharged for misconduct is entitled to be paid any installment of salary or wages which has accrued when his employment ceases.[19] Such installments of salary may be recovered as they fall due, by separate assumpsits, and, therefore, a technical reason, if no other, underlies the exception. See note to Cutter v. Powell, 2 Smith's Lead. Cas. (8th Ed.) 42; Walsh v. N. Y. & Ky. Co., 88 App. Div. 477, 85 N. Y. Supp. 83; Seaburn v. Zachmann, 99 App. Div. 218, 90 N. Y. Supp. 1005; Beach v. Mullin, 34 N. J. Law, 343; Chamblee v. Baker, 95 N. C. 98; Hartman v. Rogers, 69 Cal. 643, 11 Pac. 581; Taylor v. Laird, 1 H. & N. 266; Smith, Master & Servant, 113; 26 Cyc. 1043, and cases cited in note 34. Adopting it as just and sound in principle, we hold plaintiff, though discharged for cause, was entitled to recover any salary due and unpaid at the date of the discharge.

Counsel for defendant argue no salary was due plaintiff when he was dismissed, as he had been paid the installment which matured September 1, 1906. Another installment of $100 fell due September 16th; but the argument against plaintiff's right to recover it is that he was discharged on September 14th, two days before. We think the evidence is the other way. The dispute between plaintiff and Kimmick culminated on September 14th, and the request for plaintiff's resignation, which was the act of dismissal, was not made by the directors until Saturday the 15th, and he remained employed until said date. He was not definitely advised of his dismissal until Monday the 17th, when Coerver notified him of the action of the board and tendered him a check for $525. Hence plaintiff was entitled to recover at least $100 salary.

The more difficult point is his right to a proportionate part of the $600 which fell due January 2, 1907. * * * Beyond doubt the installment of January 2d was not due when plaintiff was discharged, and hence does not fall within the exception. But defendant accompanied the discharge with a tender of payment to plaintiff of a proportionate part of the January installment. This offer was not made by way of compromise, but in settlement of what defendant conceded plaintiff was entitled to receive. * * *

Perhaps it would be consistent with the principles of the law of

[19] "These cases [Tipton v. Feitner (1859) 20 N. Y. 423, and Smith v. Brady (1858) 17 N. Y. 185, 72 Am. Dec. 442] seem to indicate the law of this state to be that, where the parties expressly agree that service for the entire term of contract shall be rendered as a condition precedent to the payment of any part of the wages, the entire contract must be performed in order to enable the servant to recover the wages earned; but where the agreement is for payment from time to time during the term, recovery can be had for the wages earned though the servant abandons the service before the expiration of the term without cause. In this event it cannot be said full compliance with the contract is a condition precedent to the payment of the part of the wages earned." Mernagh v. Nichols (1909) 132 App. Div. 509, 118 N. Y. Supp. 59.

waiver to hold defendant had waived what, under its view of the contract, was but a technical defense—the nonmaturity of the installment when plaintiff was dismissed. * * * In view of the conceded fact that plaintiff's services were satisfactory until his quarrel with Kimmick, and of defendant's offer of payment, we hold he was entitled to such part of the January installment as he had earned. * * *

We hold plaintiff was entitled, on his own evidence, to recover no more than $525. The judgment will be modified by allowing him that sum, and, as thus modified, will be affirmed. All concur.[20]

BRITTON v. TURNER.

(Superior Court of Judicature of New Hampshire, 1834. 6 N. H. 481, 26 Am. Dec. 713.)

Assumpsit for work and labour, performed by the plaintiff, in the service of the defendant, from March 9th, 1831, to December 27, 1831.

The declaration contained the common counts, and among them a count in quantum meruit, for the labor, averring it to be worth one hundred dollars.

At the trial in the C. C. Pleas, the plaintiff proved the performance of the labor as set forth in the declaration.

The defence was that it was performed under a special contract—that the plaintiff agreed to work one year, from some time in March, 1831, to March, 1832, and that the defendant was to pay him for said year's labor the sum of one hundred and twenty dollars; and the defendant offered evidence tending to show that such was the contract under which the work was done.

Evidence was also offered to show that the plaintiff left the defendant's service without his consent, and it was contended by the defendant that the plaintiff had no good cause for not continuing in his employment.

There was no evidence offered of any damage arising from the plaintiffs departure, farther than was to be inferred from his non fulfilment of the entire contract.

The court instructed the jury, that if they were satisfied from the evidence that the labor was performed, under a contract to labor a

[20] The same rule as to apportionment is frequently applied where the servant has willfully abandoned his contract. Davis v. Preston (1844) 6 Ala. 83; Chamblee v. Baker (1886) 95 N. C. 98; Parker v. Brown & Bigelow (1912) 173 Ill. App. 48; Seaburn v. Zachmann (1904) 99 App. Div. 218, 90 N. Y. Supp. 1005; Taylor v. Laird (1856) 1 H. & N. 266. Compare Booth v. Tyson (1843) 15 Vt. 515.

The authorities are collected in 26 Cyc. 1043.

Where the doctrine of Britton v. Turner, page 413, prevails, a plaintiff who is discharged for cause has the same right to recover compensation as one who willfully abandons his employment. See Carroll v. Welch (1861) 26 Tex. 150.

year, for the sum of one hundred and twenty dollars, and if they were satisfied that the plaintiff labored only the time specified in the declaration, and then left the defendant's service, against his consent, and without any good cause, yet the plaintiff was entitled to recover, under his quantum meruit count, as much as the labor he performed was reasonably worth, and under this direction the jury gave a verdict for the plaintiff for the sum of $95.

The defendant excepted to the instructions thus given to the jury.

PARKER, J. It may be assumed that the labor performed by the plaintiff, and for which he seeks to recover a compensation in this action, was commenced under a special contract to labor for the defendant the term of one year, for the sum of one hundred and twenty dollars, and that the plaintiff has labored but a portion of that time, and has voluntarily failed to complete the entire contract.

It is clear, then, that he is not entitled to recover upon the contract itself, because the service, which was to entitle him to the sum agreed upon, has never been performed.

But the question arises, can the plaintiff, under these circumstances, recover a reasonable sum for the service he has actually performed, under the count in quantum meruit? Upon this and questions of a similar nature, the decisions to be found in the books are not easily reconciled.

It has been held, upon contracts of this kind for labor to be performed at a specified price, that the party who voluntarily fails to fulfill the contract by performing the whole labor contracted for, is not entitled to recover any thing for the labor actually performed, however much he may have done towards the performance, and this has been considered the settled rule of law upon this subject. Stark v. Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425; Faxon v. Mansfield, 2 Mass. 147; McMillan v. Vanderlip, 12 Johns. (N. Y.) 165, 7 Am. Dec. 299; Jennings v. Camp, 13 Johns. (N. Y.) 94, 7 Am. Dec. 367; Reab v. Moor, 19 Johns. (N. Y.) 337; Lantry v. Parks, 8 Cow. (N. Y.) 63; Sinclair v. Bowles, 9 Barn. & C. 92; Spain v. Arnott, 2 Starkie, 256.

That such a rule in its operation may be very unequal, not to say unjust, is apparent.

A party who contracts to perform certain specified labor, and who breaks his contract in the first instance, without any attempt to perform it, can only be made liable to pay the damages which the other party has sustained by reason of such non performance, which in many instances may be trifling; whereas a party who in good faith has entered upon the performance of his contract, and nearly completed it, and then abandoned the further performance,—although the other party has had the full benefit of all that has been done, and has perhaps sustained no actual damage,—is in fact subjected to a loss of all which has been performed, in the nature of damages for the non fulfillment of the remainder, upon the technical rule, that the contract

must be fully performed in order to a recovery of any part of the compensation.

By the operation of this rule, then, the party who attempts performance may be placed in a much worse situation than he who wholly disregards his contract, and the other party may receive much more, by the breach of the contract, than the injury which he has sustained by such breach, and more than he could be entitled to were he seeking to recover damages by an action.

The case before us presents an illustration. Had the plaintiff in this case never entered upon the performance of his contract, the damage could not probably have been greater than some small expense and trouble incurred in procuring another to do the labor which he had contracted to perform. But having entered upon the performance, and labored nine and a half months, the value of which labor to the defendant as found by the jury is $95, if the defendant can succeed in this defence, he in fact receives nearly five sixths of the value of a whole year's labor, by reason of the breach of contract by the plaintiff, a sum not only utterly disproportionate to any probable, not to say possible damage which could have resulted from the neglect of the plaintiff to continue the remaining two and a half months, but altogether beyond any damage which could have been recovered by the defendant, had the plaintiff done nothing towards the fulfilment of his contract.

Another illustration is furnished in Lantry v. Parks, 8 Cow. (N. Y.) 83. There the defendant hired the plaintiff for a year, at ten dollars per month. The plaintiff worked ten and a half months, and then left saying he would work no more for him. This was on Saturday. On Monday the plaintiff returned and offered to resume his work, but the defendant said he would employ him no longer. The court held that the refusal of the defendant on Saturday was a violation of his contract, and that he could recover nothing for the labor performed.

There are other cases, however, in which principles have been adopted leading to a different result. It is said, that where a party contracts to perform certain work, and to furnish materials, as, for instance, to build a house, and the work is done, but with some variations from the mode prescribed by the contract, yet if the other party has the benefit of the labor and materials he should be bound to pay so much as they are reasonably worth. 2 Starkie, Ev. 97, 98; Hayward v. Leonard, 7 Pick. (Mass.) 181, 19 Am. Dec. 268; Smith v. First Cong. Meeting House in Lowell, 8 Pick. (Mass.) 178; Jewell v. Schroeppel, 4 Cow. (N. Y.) 564; Hayden v. Inhabitants of Madison, 7 Greenl. (Me.) 78; Bull. N. P. 139; 4 Bos. & P. 355; Linningdale v. Livingston, 10 Johns. (N. Y.) 36; Jennings v. Camp, 13 Johns. 97, 7 Am. Dec. 367; 7 East, 479.

A different doctrine seems to have been holden in Ellis v. Hamlen, 3 Taunt. 52, and it is apparent, in such cases, that if the house has

not been built in the manner specified in the contract, the work has not been done. The party has no more performed what he contracted to perform, than he who has contracted to labor for a certain period, and failed to complete the time.

It is in truth virtually conceded in such cases that the work has not been done, for if it had been, the party performing it would be entitled to recover upon the contract itself, which it is held he cannot do.

Those cases are not to be distinguished, in principle, from the present, unless it be in the circumstance that where the party has contracted to furnish materials, and do certain labor, as to build a house in a specified manner, if it is not done according to the contract, the party for whom it is built may refuse to receive it,—elect to take no benefit from what has been performed; and therefore if he does receive, he shall be bound to pay the value, whereas in a contract for labor, merely, from day to day, the party is continually receiving the benefit of the contract under an expectation, that it will be fulfilled, and cannot, upon the breach of it, have an election to refuse to receive what has been done, and thus discharge himself from payment.

But we think this difference in the nature of the contracts does not justify the application of a different rule in relation to them. The party who contracts for labor merely, for a certain period, does so with full knowledge that he must, from the nature of the case, be accepting part performance from day to day, if the other party commences the performance, and with knowledge also that the other may eventually fail of completing the entire term.

If under such circumstances he actually receives a benefit from the labor performed, over and above the damage occasioned by the failure to complete, there is as much reason why he should pay the reasonable worth of what has thus been done for his benefit, as there is when he enters and occupies the house which has been built for him, but not according to the stipulations of the contract, and which he perhaps enters, not because he is satisfied with what has been done, but because circumstances compel him to accept it such as it is, that he should pay for the value of the house.

Where goods are sold upon a special contract as to their nature, quality, and price, and have been used before their inferiority has been discovered, or other circumstances have occurred which have rendered it impracticable or inconvenient for the vendee to rescind the contract *in toto,* it seems to have been the practice formerly to allow the vendor to recover the stipulated price, and the vendee recovered by a cross action damages for the breach of the contract. "But according to the later and more convenient practice, the vendee in such case is allowed, in an action for the price, to give evidence of the inferiority of the goods in reduction of damages, and the plaintiff who has broken his contract is not entitled to recover more than the value of the benefits which the defendant has actually derived from the goods; and where

the latter has derived no benefit, the plaintiff cannot recover at all." 2 Starkie, Ev. 640, 642; Okell v. Smith, 1 Starkie, 107.

So, where a person contracts for the purchase of a quantity of merchandise, at a certain price, and receives a delivery of part only, and he keeps that part, without any offer of a return, it has been held that he must pay the value of it. Shipton v. Casson, 5 Barn. & C. 378; Com. Dig. tit. "Action" (F); Barker v. Sutton, 1 Camp. 55, note. A different opinion seems to have been entertained, Waddington v. Oliver, 2 Bos. & P. (N. R.) 61; and a different decision was had, Walker v. Dixon, 2 Starkie, 281.

There is a close analogy between all these classes of cases, in which such diverse decisions have been made. If the party who has contracted to receive merchandise, takes a part and uses it, in expectation that the whole will be delivered, which is never done, there seems to be no greater reason that he should pay for what he has received, than there is that the party who has received labor, in part under similar circumstances, should pay the value of what has been done for his benefit.

It is said, that in those cases where the plaintiff has been permitted to recover there was an acceptance of what had been done. The answer is, that where the contract is to labor from day to day, for a certain period as it is performed, and although the other may not eventually do all he has contracted to do, there has been, necessarily, an acceptance of what has been done in pursuance of the contract, and the party must have understood when he made the contract that there was to be such acceptance.

If then the party stipulates in the outset to receive part performance from time to time, with a knowledge that the whole may not be completed, we see no reason why he should not equally be holden to pay for the amount of value received, as where he afterwards takes the benefit of what has been done, with a knowledge that the whole which was contracted for has not been performed. In neither case has the contract been performed. In neither can an action be sustained on the original contract. In both the party has assented to receive what is done. The only difference is, that in the one case the assent is prior, with a knowledge that all may not be performed, in the other it is subsequent, with a knowledge that the whole has not been accomplished.

We have no hesitation in holding that the same rule should be applied to both classes of cases, especially, as the operation of the rule will be to make the party who has failed to fulfill his contract, liable to such amount of damages as the other party has sustained, instead of subjecting him to an entire loss for a partial failure, and thus making the amount received in many cases wholly disproportionate to the injury. 1 Saund. 320c; 2 Starkie, Ev. 643.

It is as "hard upon the plaintiff to preclude him from recovering at

all, because he has failed as to part of his entire undertaking," where his contract is to labor for a certain period, as it can be in any other description of contract, provided the defendant has received a benefit and value from the labor actually performed.

We hold then, that where a party undertakes to pay upon a special contract for the performance of labor, or the furnishing of materials, he is not to be charged upon such special agreement until the money is earned according to the terms of it; and where the parties have made an express contract the law will not imply and raise a contract different from that which the parties have entered into, except upon some farther transaction between the parties.

In case of a failure to perform such special contract, by the default of the party contracting to do the service, if the money is not due by the terms of the special agreement he is not entitled to recover for his labor, or for the materials furnished, unless the other party receives what has been done, or furnished, and upon the whole case derives a benefit from it. Taft v. Inhabitants of Montague, 14 Mass. 282, 7 Am. Dec. 215; 2 Starkie, Ev. 644.

But if, where a contract is made of such a character, a party actually receives labor or materials, and thereby derives a benefit and advantage, over and above the damage which has resulted from the breach of the contract by the other party, the labor actually done, and the value received, furnish a new consideration, and the law thereupon raises a promise to pay to the extent of the reasonable worth of such excess. This may be considered as making a new case, one not within the original agreement, and the party is entitled to "recover on his new case, for the work done, not as agreed, but yet accepted by the defendant." 1 Dane, Abr. 224.

If on such failure to perform the whole, the nature of the contract be such that the employer can reject what has been done, and refuse to receive any benefit from the part performance, he is entitled so to do, and in such case is not liable to be charged, unless he has before assented to and accepted of what has been done, however much the other party may have done towards the performance. He has in such case received nothing, and having contracted to receive nothing but the entire matter contracted for, he is not bound to pay, because his express promise was only to pay on receiving the whole, and having actually received nothing the law cannot and ought not to raise an implied promise to pay. But where the party receives value, takes and uses the materials, or has advantage from the labor, he is liable to pay the reasonable worth of what he has received. Farnsworth v. Garrard, 1 Camp. 38. And the rule is the same whether it was received and accepted by the assent of the party prior to the breach, under a contract by which, from its nature, he was to receive labor, from time to time until the completion of the whole contract; or whether it was received and accepted by an assent subsequent to the performance of

all which was in fact done. If he received it under such circumstances as precluded him from rejecting it afterwards, that does not alter the case; it has still been received by his assent.

In fact, we think the technical reasoning, that the performance of the whole labor is a condition precedent, and the right to recover anything dependent upon it; that, the contract being entire, there can be no apportionment; and that, there being an express contract, no other can be implied, even upon the subsequent performance of service,—is not properly applicable to this species of contract, where a beneficial service has been actually performed; for we have abundant reason to believe, that the general understanding of the community is, that the hired laborer shall be entitled to compensation for the service actually performed, though he do not continue the entire term contracted for, and such contracts must be presumed to be made with reference to that understanding, unless an express stipulation shows the contrary.

Where a beneficial service has been performed and received, therefore, under contracts of this kind, the mutual agreements cannot be considered as going to the whole of the consideration, so as to make them mutual conditions the one precedent to the other, without a specific proviso to that effect. Boone v. Eyre, 1 H. Bl. 273, note; Campbell v. Jones, 6 Term R. 570; Ritchie v. Atkinson, 10 East, 295; Burn v. Miller, 4 Taunt. 745.

It is easy, if parties so choose, to provide by an express agreement that nothing shall be earned, if the laborer leaves his employer without having performed the whole service contemplated, and then there can be no pretence for a recovery if he voluntarily deserts the service before the expiration of the time.

The amount, however, for which the employer ought to be charged, where the laborer abandons his contract, is only the reasonable worth or the amount of advantage he receives upon the whole transaction (Wadleigh v. Sutton, 6 N. H. 15, 23 Am. Dec. 704); and, in estimating the value of the labor, the contract price for the service cannot be exceeded (Hayden v. Inhabitants of Madison, 7 Greenl. [Me.] 78; Dubois v. Canal Co., 4 Wend. [N. Y.] 285; Koon v. Greenman, 7 Wend. [N. Y.] 121).

If a person makes a contract fairly he is entitled to have it fully performed; and if this is not done he is entitled to damages. He may maintain a suit to recover the amount of damage sustained by the nonperformance.

The benefit and advantage which the party takes by the labor, therefore, is the amount of value which he receives, if any, after deducting the amount of damage; and if he elects to put this in defence he is entitled so to do, and the implied promise which the law will raise, in such case, is to pay such amount of the stipulated price for the whole labor, as remains after deducting what it would cost to procure a com-

pletion of the residue of the service, and also any damage which has been sustained by reason of the non-fulfilment of the contract.

If in such case it be found that the damages are equal to or greater than the amount of the labor performed, so that the employer, having a right to the full performance of the contract has not upon the whole case received a beneficial service, the plaintiff cannot recover.

This rule, by binding the employer to pay the value of the service he actually receives, and the laborer to answer in damages where he does not complete the entire contract, will leave no temptation to the former to drive the laborer from his service, near the close of his term, by ill treatment, in order to escape from payment; nor to the latter to desert his service before the stipulated time, without a sufficient reason; and it will in most instances settle the whole controversy in one action, and prevent a multiplicity of suits and cross actions.

There may be instances, however, where the damage occasioned is much greater than the value of the labor performed, and if the party elects to permit himself to be charged for the value of the labor, without interposing the damages in defence, he is entitled to do so, and may have an action to recover his damages for the non-performance, whatever they may be. Crowninshield v. Robinson, 1 Mason, 93, Fed. Cas. No. 3,451.

And he may commence such action at any time after the contract is broken, notwithstanding no suit has been instituted against him; but if he elects to have the damages considered in the action against him, he must be understood as conceding that they are not to be extended beyond the amount of what he has received, and he cannot afterwards sustain an action for farther damages.

Applying the principles thus laid down, to this case, the plaintiff is entitled to judgment on the verdict.

The defendant sets up a mere breach of the contract in defence of the action, but this cannot avail him. He does not appear to have offered evidence to show that he was damnified by such breach, or to have asked that a deduction should be made upon that account. The direction to the jury was therefore correct; that the plaintiff was entitled to recover as much as the labor performed was reasonably worth, and the jury appeared to have allowed a pro rata compensation, for the time which the plaintiff labored in the defendant's service.

As the defendant has not claimed or had any adjustment of damages, for the breach of the contract, in this action, if he has actually sustained damage he is still entitled to a suit to recover the amount.

Whether it is not necessary, in cases of this kind, that notice should be given to the employer that the contract is abandoned, with an offer of adjustment and demand of payment; and whether the laborer must not wait until the time when the money would have been due according to the contract, before commencing an action (2 Bos. & P.

[N. R.] 61), are questions not necessary to be settled in this case, no objections of that nature having been taken here.

Judgment on the verdict.[21]

MILLER v. GODDARD.

(Supreme Judicial Court of Maine, 1852. 34 Me. 102, 56 Am. Dec. 638.)

Assumpsit, for labor performed.

The plaintiff worked for the defendant in the woods, three or four months. Both parties admitted, that the labor was performed under a contract for a longer term at an agreed price per month. The plaintiff insisted, that the defendant discharged him without cause. On the other side it was insisted that the plaintiff voluntarily quit, without fault or consent of the defendant. Upon these questions, evidence was introduced.

The Judge instructed the jury that, if the plaintiff agreed to work during the lumbering season, and left before that time was out, without the fault or consent of the defendant, he could still recover his wages for the time he did perform, deducting therefrom the damages, if any, which such leaving caused to defendant, (unless the damage thus caused to defendant, was equal to, or exceeded the amount of plaintiff's wages due at the time when he left, in which case

[21] Accord: Pitts' Adm'r v. Pitts (1863) 21 Ind. 309; Pixler v. Nichols (1859) 8 Iowa, 106, 74 Am. Dec. 298; Duncan v. Baker (1878) 21 Kan. 99; Parcell v. McComber (1881) 11 Neb. 209, 7 N. W. 529, 38 Am. Rep. 366; Lynn v. Seby (1915) 29 N. D. 420, 151 N. W. 31, page 426, infra; Limerick v. Lee (1906) 17 Okl. 165, 87 Pac. 859; Bedow v. Tomkin (1894) 5 S. D. 432, 59 N. W. 222; Carroll v. Welch (1861) 26 Tex. 147. See, also, Williams v. Crane (1908) 153 Mich. 89, 116 N. W. 554. In Timberlake v. Thayer (1893) 71 Miss. 279, 14 South. 446, 24 L. R. A. 231, the court expressed regret that the precedents prevented its adopting the rule of Britton v. Turner.

In Kentucky it seems that a recovery is allowed at the contract rate. Western v. Sharp (1853) 14 B. Mon. (53 Ky.) 177; Asher v. Tomlinson (1901, Ky.) 60 S. W. 714. But see Buckwalter v. Bradley (1907) 31 Ky. Law Rep. 1177, 104 S. W. 970.

In Limerick v. Lee, supra, the court said: "The leading case with reference to contracts for personal services sustaining recovery on 'quantum meruit' is Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713, and the doctrine there laid down is better adapted to do adequate justice to both parties and wrong to neither than those numerous cases which rest upon the somewhat technical rules of the entirety of contract. In McClay v. Hedge (1864) 18 Iowa, 66, Judge Dillon, speaking for the court, said: 'Referring to the doctrine laid down in Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713, * * * its principles have been gradually winning their way into professional and judicial favor. It is bottomed on justice, and is right upon principle, however it may be upon the technical and more illiberal rules of the common law as found in the older cases.' In Duncan v. Baker, 21 Kan. 99, it was held, 'where a contract is entire and has been only partially fulfilled, the party in fault may nevertheless recover from the other party for the actual benefit received and retained by the other party less the damages sustained by the other party by reason of the partial nonfulfillment of the contract; and this may be done in all cases where the other party has received benefit from the partial fulfillment of the contract whether he has so received the same and retained it from choice or from the necessities of the case.'"

plaintiff could recover nothing, and their verdict would be for defendant.)

The verdict was for the plaintiff, and the defendant excepted.

WELLS, J.[22] This was an action for work performed under a special contract, in which, it was alleged, the plaintiff was to labor during the season of lumbering, at an agreed price per month.

The Judge of the District Court instructed the jury in substance, that if the plaintiff left the employment of the defendant before the contract was performed without the fault or consent of the defendant, still the plaintiff could recover his wages for the time he labored, deducting the damages, which the defendant sustained by a want of entire performance of the contract, and if they were equal to the wages or exceeded them then the plaintiff could not recover anything.

It is a rule of the common law, that where an entire service is to be performed, for an entire compensation to be paid at its completion, the performance of the service is a condition precedent to the recovery of the compensation. The language of such contract indicates clearly, that it is not intended by the parties that the stipulated price should be paid until the service is performed. And it is manifest, that the rule is founded in the familiar principle, that contracts should be expounded and executed according to the true and just intent of the parties. Cutter v. Powell, 6 T. R. 320; Spain v. Arnott, 2 Stark. R. 227. "Unless there be some express stipulation to the contrary, whenever a specific sum is to be paid for specific work, the performance or service is a condition precedent; there being one condition and one debt, they cannot be divided." 3 Stark. Ev. 1303.

In the case of Stark v. Parker, 2 Pick. (Mass.) 267, 13 Am. Dec. 425, which was an action for services rendered, it was held, that the plaintiff must perform the agreed service as a condition precedent to his right to recover anything under the contract and that he could not renounce the contract and recover on a quantum meruit. The same principle is confirmed in Olmstead v. Beale, 19 Pick. (Mass.) 528. And the law is held to be the same in Lantry v. Parks, 8 Cow. (N. Y.) 63.

In New Hampshire, it has been thought more equitable that in such cases, the laborer, who has departed from his contract, should recover what his services were reasonably worth. Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713. When the laborer has adequate cause to justify an omission to fulfil the contract, he cannot be regarded as in any fault. But it does not very well accord with the good faith, which the rules of law uniformly require to allow him to stop at any stage of his labor, in open violation of his agreement, and still compel his employer to pay him what his services are worth. If it were permitted to the laborer to determine the contract at his pleasure, no well founded reliance could be placed, at any time, upon a due observance of it.

[22] A portion of the opinion is omitted.

It is contended that this case falls within that class where work and labor and materials are furnished in the performance of contracts, like those of Hayden v. Madison, 7 Greenl. 79, Abbot v. Hermon, 7 Greenl. 118, and Norris v. School District in Windsor, 12 Me. 293, 28 Am. Dec. 182, and there is not a complete and full performance in all respects. But it will be found in those cases, that there was a waiver of a strict compliance or an acceptance of what was done, or that the work was done and the materials furnished, but not in the manner specified in the contract and without any intentional variation from it. Knowlton v. Inhabitants of Plantation No. 4, 14 Me. 20.

The present case is not one of an imperfect performance, as it would be if the plaintiff had labored during the time, but had performed his labor in a negligent and unskillful manner; but an absolute want of performance, for a portion of the time employed, is the ground upon which the instruction was based. * * *

The exceptions are sustained.

JOHNSON v. FEHSEFELDT.

(Supreme Court of Minnesota, 1908. 106 Minn. 202, 118 N. W. 797, 20 L. R. A. [N. S.] 1069.)

Appeal from District Court, Grant County; S. A. Flaherty, Judge.

Action by Harold Johnson and others against John Fehsefeldt. Verdict for plaintiffs. From an order denying a motion for a new trial, defendant appeals.

JAGGARD, J. Plaintiffs and respondents, owners of a threshing outfit, entered into a verbal agreement with defendant and appellant to thresh defendant's grain, for which defendant agreed to pay the sum of 10 cents a bushel for wheat, 6 cents a bushel for oats, and 15 cents for flax. Plaintiffs contend that this case involved an agreement to thresh grain at so much per bushel; defendant, that it was to thresh all of his crop of grain. Upon the record, we are of the opinion that the question was one of fact. Pursuant to the agreement the plaintiffs threshed a portion of the crop. Before the entire crop had been threshed, plaintiffs hauled their threshing machine away from defendant's premises and refused to thresh more for the reason that they were losing money. There was testimony tending to show that there were some 300 acres of grain left in shock, which plaintiffs neglected and refused to thresh. Defendant then completed the threshing of his grain, through other parties. Subsequently plaintiffs filed threshers' liens. The court directed a verdict in effect for the plaintiffs for the work and threshing they had done at the agreed price per bushel. A motion for a new trial was denied, provided the plaintiffs stipulated for a reduction of the verdict. The stipulation was filed. The court thereupon denied the motion for a new trial, from which appellant appealed.

For present purposes, and for them only, it must and will be assumed, upon a construction most favorable to the defeated party, that plaintiffs agreed to thresh all of defendant's crop. The essential question is whether the contract was entire and indivisible, in the sense that plaintiffs could not recover upon a quantum meruit or upon the contract to the extent to which it had been performed. On principle we are of opinion that plaintiffs could not recover. When they found that they were operating at a loss, they had the option to complete the contract, recover the contract price, and submit to the loss, or to abandon the contract, lose the work they had done, and be subject to whatever damages might be recoverable for the breach of the contract. The fact that plaintiffs had rendered services, the value of which defendant retained, did not entitle plaintiffs to recover on quantum meruit because of the contract and of the inability of defendants to return the services. "As said in Galvin v. Prentice, 45 N. Y. 162, 6 Am. Rep. 58: 'When the contract is entire, and one party is willing to complete the performance and is not in default, no promise can be implied on his part to compensate the other party for a part performance.' Certainly it must be so where the failure to fully perform is due wholly to the fault of such other party." Kriger v. Leppel, 42 Minn. 6, 43 N. W. 484. And see Nelichka v. Esterly, 29 Minn. 146, 12 N. W. 457; Kohn v. Fandel, 29 Minn. 470, 13 N. W. 904.

It would be obviously inconsistent with common justice that plaintiffs should recover pro tanto on the contract which they had substantially violated. They were in the wrong. They were not in a position to say to defendant: "We will perform the contract we have agreed to if it prove profitable. If we find it unprofitable, we will abandon it." That would be to contradict the contract. Such reasoning is forbidden by its terms. Defendant did not agree in advance to a breach of the contract and to accept in lieu of performance the requirement that he pay plaintiffs for what they had done under the contract and for the balance to accept the right to try damages before a jury. Such speculation on the part of the plaintiffs it would be unreasonable to permit. It is well settled in this state that the failure to perform an entire contract ordinarily defeats the right to recover on the contract. Atwater J., said in Mason v. Heyward, 3 Minn. 182 (Gil. 116, 122): "Where a party willfully, or without cause, refuses to complete a contract which he has made, and upon the execution of which he has entered, courts should never interfere to protect him from the consequences of his own wrong." It is true that where, as in building contracts, there is a substantial performance, the court will not permit the owner of the land to retain the fruits of the labor and refuse to pay for it. Leeds v. Little, 42 Minn. 414, 44 N. W. 309. It is equally clear, however, that where there has been an intentional failure to complete the contract, or a departure so substantial as to be incapable of a remedy, there can be no partial recovery. Elliott v. Caldwell, 43

Minn. 357, 45 N. W. 845, 9 L. R. A. 52;* Hoglund v. Sortedahl, 101 Minn. 359, 112 N. W. 408.

This view accords with prevailing authority. "A partial performance may be a defense pro tanto, or it may sustain an action pro tanto; but this can be only in cases where the duty to be done consists of parts which are distinct and severable in their own nature, and are not bound together by expressions giving entirety to the contract. It is not enough that the duty to be done is in itself severable, if the contract contemplated it only as a whole." Parsons, Cont. *658, *659. "The mere fact that * * * the value is ascertained by the price affixed to each pound, or yard, or bushel of the quantity contracted for will not be sufficient to render the contract severable." Parsons, Cont. *517.[23]

Reversed, and a new trial granted.[24]

*This case is summarized in a note, page 399, supra.

[23] In McMillan v. Malloy (1880) 10 Neb. 228, 4 N. W. 1004, 35 Am. Rep. 471, the court held that a threshing contract similar to the one in the principal case was not entire, but severable. See, also, the cases cited in the note to the principal case in 20 L. R. A. (N. S.) 1069.

[24] The great weight of authority is in accord with the principal case and Miller v. Goddard, page 421, supra. See, especially, Sinclair v. Bowles (1829) 9 B. & C. 92; Stark v. Parker (1824) 2 Pick. (Mass.) 267, 13 Am. Dec. 425; Diefenback v. Stark (1883) 56 Wis. 462, 14 N. W. 621, 43 Am. Rep. 719; Hughes v. Cannon (1834) 1 Sneed (Tenn.) 622.

Among the more recent decisions denying all right of recovery to one who has committed a willful breach of his contract of personal service, are the following: Graden v. Buford (1911) 1 Ala. App. 668, 56 South. 77; Latham v. Barwick (1908) 87 Ark. 328, 113 S. W. 646; Ptacek v. Pisa (1907) 231 Ill. 522, 83 N. E. 221, 14 L. R. A. (N. S.) 537; Sipley v. Stickney (1906) 190 Mass. 43, 76 N. E. 226, 5 L. R. A. (N. S.) 469, 112 Am. St. Rep. 309, 5 Ann. Cas. 611; Walden v. American Bankers' Assurance Co. (1914) 183 Mo. App. 376, 166 S. W. 1111; Waite v. C. E. Shoemaker & Co. (1915) 50 Mont. 264, 146 Pac. 736; Daly v. Jefferson Hotel Co. (1914) 98 S. C. 222, 82 S. E. 412.

In Waite v. Shoemaker, supra, the court said: "There are exceptions to the general rule that a failure of full performance is conclusive of plaintiff's right to recover. These are cases in which the departures from the stipulations in the contract are not substantial and intentional, and do not affect the entire result, and the defendant has received benefits which it would be unjust to permit him to retain, without paying anything. This is particularly true of building contracts. In such a case the law implies a promise on the part of the adverse party to pay what the benefit is worth, and permits recovery for it upon a quantum meruit, provided the defendant may recoup all damages sustained by him by reason of plaintiff's delinquency. In such cases the parties cannot rescind and stand in statu quo, and it is but just that compensation should be made by the adverse party for the actual benefit received. The following cases, taken from among many cited in plaintiff's brief, support this doctrine: [Citations omitted.] We think it is supported by the great weight of authority. As was said, however, in Phillip v. Gallant, 62 N. Y. 256: 'There must be no willful or intentional departure, and the defects must not pervade the whole, or be so essential as that the object which the parties intended to accomplish—to have a specified amount of work performed in a particular manner—is not accomplished.' See, also, Woodward v. Fuller, 80 N. Y. 312, and Sinclair v. Talmadge, 35 Barb. (N. Y.) 602. To permit a plaintiff to recover, though it appears that he has willfully disregarded his engagement in essential particulars would be for the law to encourage parties to be delinquent in the performance of their solemn engagements; whereas its policy is to compel observance of them."

The authorities are discussed at length in 65 Central Law Journal, 292.

LYNN v. SEBY.

(Supreme Court of North Dakota, 1915. 29 N. D. 420, 151 N. W. 31.)

Appeal from District Court, Eddy County; Buttz, Judge.

Action by Arthur Lynn against Iver Seby. From judgment for plaintiff, defendant appeals.

Goss, J.[25] Plaintiff has recovered judgment against defendant for a small amount as a balance of a threshing bill. Judgment was granted upon the pleadings. In brief, plaintiff agreed to thresh all of defendant's grain. He threshed the wheat and oats, but refused to thresh the flax. Defendant was unable to procure threshing of his flax that fall, and defends and counterclaims for the amount of the resulting damage from the flax remaining unthreshed through the winter. The contract for threshing was the usual one, with no special provision whereby plaintiff agreed to be responsible in damages for more than ordinary liability. Therefore the counterclaim did not plead a cause of action for damages, under the holding in Hayes v. Cooley, 13 N. D. 204, 100 N. W. 250, for the reason that the loss of grain through resulting exposure to the elements is a remote and not a proximate consequence of the breach of the contract and will not sustain a recovery, the measure of which is defined by section 7146, C. L. 1913, merely declaratory of the common law. It cannot be said that such damages are those "which in the ordinary course of events would be likely to result" from the breach of the contract by plaintiff. Defendant concedes this to be the declared law of this state, but avers that the same should be either overruled, or there should be ingrafted thereon the further condition that if defendant cannot recover such damages plaintiff should not be allowed to breach his contract and also recover for the part performance by him. Or, in other words, that the parties should be left as they are found, and, if plaintiff sees fit to breach his contract, that he should go without pay for the portion performed and for which he would have received payment had he fully performed.

The question is an important one, and no doubt much can be said towards, and much authority cited sustaining, the contention of the defendant. The rule at common law was against plaintiff's recovery until the case of Britton v. Turner, 6 N. H. 481, 26 Am. Dec. 713, was decided in 1834, in disregard of precedent. But the reasoning of that case is so cogent that it seems to have at least divided, if not changed, the current of authority. It first recognized the fact of the benefits of the part performance to the party who would keep such benefits, incapable of being returned, and still avoid paying anything for the benefits accrued where the contract is not fully performed. It may be remarked that, besides affecting parties similarly situated to those before us, this decision must also be a precedent upon the right of recovery of those in analogous positions, as, for instance, the farm la-

[25] A portion of the opinion, discussing a point of pleading, is omitted.

borer who hires for the summer and at the end of six months' labor performed quits his employment, and similar cases, where the contract is indivisible. An equitable rule has gradually developed permitting a recovery for the value of the services rendered, irrespective of the breach, giving to the other party to the contract a corresponding right of action in damages separately or in mitigation of the plaintiff's recovery, so that the rights of both may be equitably adjusted at law, notwithstanding the breach and nonperformance of the contract. Bedow v. Tonkin, 5 S. D. 432, 59 N. W. 222; Ball v. Dolan, 21 S. D. 619, 114 N. W. 998, 15 L. R. A. (N. S.) 272; Stolle v. Stuart, 21 S. D. 643, 114 N. W. 1007; Williams v. Crane, 153 Mich. 89, 116 N. W. 554; Allen v. McKibbin, 5 Mich. 449; Bush v. Brooks, 70 Mich. 446, 38 N. W. 562; Buckwalter v. Bradley, 31 Ky. Law Rep. 1177, 104 S. W. 970; Byerlee v. Mendel, 39 Iowa, 382; Pixler v. Nichols, 8 Iowa, 106, 74 Am. Dec. 298; Hillyard v. Crabtree, 11 Tex. 264, 62 Am. Dec. 475; Burkholder v. Burkholder, 25 Neb. 270, 41 N. W. 145; Duncan v. Baker, 21 Kan. 99; Pitts v. Pitts, 21 Ind. 309. This is true only where that which has been received by the employer under the partial performance has been beneficial to him. "The implication of a promise in all such cases is derived from the fact that the performance has been beneficial to him." 9 Cyc. 689, 685,

In this case it must be admitted that the threshing done was of substantial benefit to defendant and a partial performance of this contract. While there is a division of authority, and the weight of authority, from the number of holdings alone (26 Cyc. 1042), would deny a right of recovery, yet we prefer to follow the other line of authority. Either rule must, under certain circumstances work injustice. Otherwise there would be no division in authorities. We elect to follow that which we believe to be the trend of authority. It may be noted that cases of default under sales contracts, similar to Pfeiffer v. Norman, 22 N. D. 168, 133 N. W. 97, 38 L. R. A. (N. S.) 891, must not be taken as analogous to contracts for work and labor as involved in the instant case. The implications arising from the reception of benefits of part performance of employment contracts, where that which is so received cannot be returned, has no analogy to sale transactions where a portion of the price is paid and the party to pay the balance sees fit to default and attempts to recover back what he has paid in partial performance and before his default. Likewise a different equitable rule has developed under building contracts, the rule of substantial compliance and performance, and such authorities are not strictly applicable. * * *

The judgment is affirmed.[26]

[26] Accord, on similar facts: Riech v. Bolch (1886) 68 Iowa, 526, 27 N. W. 507.

CHAPTER IV

BENEFITS VOLUNTARILY CONFERRED WITHOUT CONTRACT

SECTION 1.—PLAINTIFF ACTED WITHOUT EXPECTATION OF COMPENSATION

ST. JUDE'S CHURCH v. VAN DENBERG.

(Supreme Court of Michigan, 1875. 31 Mich. 287.)

Error to Genesee Circuit.

GRAVES, C. J. The defendant in error sued on the common counts to recover a claim against the church for services and some other matters, and the case was sent to a referee, who heard the parties and made a finding in favor of defendant in error.

Some exceptions were taken, but the circuit court sustained the doings of the referee.

The plaintiff in error then removed the case here by writ of error. Several questions were mooted on the argument, but only a single point of any importance appears to have been saved in any form to be reviewed by this court. The referee decided that the defendant in error had a valid demand or cause of action for six hundred and thirty-four dollars and thirty-four cents, and judgment was entered for this amount, together with interest upon it from the date of the report. There was included in the sum so found by the referee, the amount of four hundred dollars allowed for Mr. Van Denberg's services as sexton, and the interest upon that sum from the 17th of December, 1870. And the validity of this allowance is, we think, subject to be considered on this record. The claim for services as sexton is made to rest entirely upon an implied agreement.

All the evidence given before the referee appears to be returned in the bill of exceptions, and the point is taken that there was none tending to show or maintain any implied promise of the plaintiff in error to pay for these services, and this position appears to be well founded. During the time of service for which he claims, he was a vestryman, and part of it, at least, senior warden and also treasurer. He also held some other places in the society and seems to have been an active and efficient member. He constantly took a leading part in the secular affairs of the church and acted as men do in such situations when no compensation is thought of on any hand, and it appears very clear upon the proof, that when he served in character of sexton he was not

acting for pay, and that neither himself nor the church expected he was to be paid. The performance of the duty was plainly voluntary, and it was manifestly supposed on both sides that his service was something he was spontaneously giving from a desire to promote a cause he had at heart, and not in any extent whatever to get money. Now, it is well settled that no promise will be implied when the implication would be repugnant to an express promise, and it is equally plain that no promise can be implied where the circumstances not only fail to indicate that the services were rendered or received for compensation, but clearly repel the idea that payment was to be made or asked for. And such is the case here. The relations of the parties, the nature of the service, and all the pertinent facts point in one direction, and they clearly establish that the defendant in error, in acting as sexton, did not work for money or pecuniary pay, and that the church, in accepting the service, did not understand that pay was to be exacted, and did not undertake to make any pecuniary return. The allowance, then, was unsupported by any evidence tending to favor it. As this item itself was wrong, it was of course improper to give interest upon it.

For this error the judgment must be reversed, with the costs of this court. But as the facts are before us as found by the referee, it is competent to enter judgment in this court for the true amount, and that we find to be two hundred and twenty-seven dollars and forty-two cents.[1]

ST. JOSEPH'S ORPHAN SOCIETY v. WOLPERT.

(Court of Appeals of Kentucky, 1882. 80 Ky. 86.)

HARGIS, J. The appellant, a charitable institution for the rearing, maintaining, and educating of orphan children brought this action against John Schulten, as guardian of Frank, George, Catherine, and John Wolpert, and against each of said infants in their individual capacity, for the value of raising, taking care of, and educating them.

The petition, stripped of its formal parts, substantially alleges that the infants named were supposed by appellant and their guardian to

[1] In Potter v. Carpenter (1879) 76 N. Y. 157, to plaintiffs' action on defendants' note and for services, defendants counterclaimed for the use by plaintiffs of defendants' barn and for services rendered by defendants in teaming for plaintiffs. It appeared that neither party had kept any account of the mutual services (which had gone on for several years), and that the parties had recently settled an open account for goods sold. The court held that, in the absence of proof of any express agreement to pay for the teaming, such an agreement could not properly be implied, Rapallo, J., saying: "The findings show that, during all the period covered by these transactions, these parties were in the habit of rendering mutual services to each other, and that although they had pecuniary transactions to a considerable amount, these services were not brought, nor intended to be brought into their accounts. Upon such a state of facts a promise to pay cannot be implied, and these services must be regarded as matters of mutual accommodation, for which neither party intended to make any charge against the other."

See also Spadoni v. Giacomazzi (1915) 27 Cal. App. 149, 149 Pac. 51.

be penniless, and that the appellant received, cared for, and educated them as persons who have no property or means, and that such persons were so received and cared for without charge in the institution; but that the by-laws authorized by its charter provides that the guardian of orphans who have property, means, or estate might contract with appellant's board of trustees, and agree upon the conditions of their admission; and that appellant has recently discovered that the infant appellees did have some money, which was received from their mother's estate, and as a pension, by reason of the military service of their father in the United States army.† * * *

After the appellant, under protest, elected to prosecute its action against the guardian of John Wolpert, the latter demurred, and the court sustained the demurrer, and that ruling forms the next question to be determined.

It will be noticed that the appellant does not allege any promise or agreement with the guardian or the infants, either for board, care, or education, and having, from charitable motives, taken, raised, and educated them without intending to charge therefor, as it alleges, it cannot, by reason of this express and executed gratuity, recover on an implied assumpsit raised by law, unless the alleged mistake in the condition of these orphans will authorize a revocation of its consent, and impose upon them a liability for what it voluntarily did. It is not alleged that the guardian intentionally or fraudulently suppressed the knowledge from appellant of the existence of the small sum which they received by distribution from their mother's estate or of the pension; and a close analysis of the whole case presents the question, whether a charitable institution, incorporated for the purpose, shall be permitted to receive, care for, and educate orphans, with the express understanding that nothing is to be charged therefor, and when it is discovered that such orphans have received by the misfortunes of war, and the charity of the government, a pension for the purpose of subsistence, which is exempt from attachment, levy, or seizure, revoke its gratuity, and share with the beneficiaries that charity which they have received from another source.

We do not think it can be allowed this privilege of recantation, because its charter and by-laws authorized it to contract for compensation; yet it failed to arm itself with an agreement therefor, and no deception is alleged to have been practiced to prevent this exaction.

And it has been held too often to admit of doubt or discussion, that an executed gift or gratuity cannot be revoked by the donor, no matter what may have been the condition of the donee, or what charities he shall receive, or property acquire in the future, unless the donation or gratuity were the result of fraud or mistake in its execution.

And there is no reason why an executed gift of personal property

† A portion of the opinion, upholding the ruling of the trial court requiring the appellant to elect which cause of action it would prosecute, is omitted.

shall not be revoked that does not sustain the irrevocability of gratuitous labor, care, board, or education after completion.

One is no more the executed donation of value than the other, and the same principle of law is equally applicable to both.

The creation of the appellant was for charitable and benevolent purposes, and the undertaking of its holy mission presupposes that its labor of love is to be done without money and without price, and unless a special agreement, which seems to have been authorized by its charter, in view of the gratuitous nature of the office of this institution, were made for compensation, we do not think it can recover for board, care, and education of orphans whose control it has sought with the avowed purpose of bestowing charity upon them.

There was no mistake in the execution of these charitable donations, which do not partake of the nature of a contract to the same degree that ordinary gifts do; but the objects of this charity seem to have been less needy than appellant supposed, and this is all we are authorized to infer from the allegations of the petition.

Under what is known as the hospitality act, an uninvited guest cannot be held liable on an implied assumpsit, and certainly infants, who are invited generally and specially to a charitable institution, cannot be held bound for the charity they receive without an express promise to pay, simply because they happened to have and receive property, which was unknown to the managers of the institution until after the performance of the charity.

Were this otherwise, this noble charity would be converted into a sort of house of private entertainment, to which obligations of indebtedness might be contracted unawares by orphans and guardians, and those who received its assistance free would become debtors therefor by the unexpected development of ownership hitherto unknown to the institution.

The demurrer, in our opinion, was properly sustained. Judgment affirmed.[2]

[2] Similarly, by the common-law doctrine, in the absence of fraud, a supposed pauper, to whom poor relief has been granted, cannot be required to reimburse the municipality furnishing such relief out of property then owned or subsequently acquired by him. Charlestown v. Hubbard (1838) 9 N. H. 195: City of Albany v. McNamara (1889) 117 N. Y. 168, 22 N. E. 931, 6 L. R. A. 212; Chariton County v. Hartman (1905) 190 Mo. 71, 88 S. W. 617. But see contra: In re Clabbon, [1904] 2 Ch. 465. Such liability is sometimes imposed by statute. Directors of the Poor v. Nyce (1894) 161 Pa. 82, 128 Atl. 999. Board of Directors v. Smith (1901) 64 S. W. 466, 23 Ky. Law Rep. 860 (statute construed to permit recovery for future support only, not for past support).

The same doctrine applies to lunatics to whom public aid has been given in the belief that they were without property. Montgomery County v. Gupton (1897) 139 Mo. 303, 39 S. W. 447, 40 S. W. 1094; Oneida County v. Bartholomew (1894) 82 Hun, 80, 31 N. Y. Supp. 106 (no liability at common law; statutory recovery limited to future support); Inhabitants of Stow v. Sawyer (1862) 3 Allen (Mass.) 515. Contra: McNairy County v. McCoin (1898) 101 Tenn. 74, 45 S. W. 1070, 41 L. R. A. 862.

In Shepherd v. Young (1857) 8 Gray (Mass.) 152, 69 Am. Dec. 242, the plaintiff took into her home and supported her married daughter and the latter's infant child, the husband and father having deserted his family without

HOWARD v. RANDOLPH.

(Supreme Court of Georgia, 1910. 134 Ga. 691, 68 S. E. 586, 29 L. R. A. [N. S.] 294, 20 Ann. Cas. 392.)

Error from Superior Court, Jackson County; C. H. Brand, Judge.

Action by M. M. Randolph against W. C. Howard and others, executors of J. E. Randolph. Judgment for plaintiff, and defendants bring error.

EVANS, P. J.[3] This is a suit to recover upon a quantum meruit $3,949 principal, besides interest, for services alleged to have been rendered to J. E. Randolph, the defendants' testator. The greater part of the recovery sought is claimed for services alleged to have been rendered during the plaintiff's minority. The jury rendered a verdict in her favor for $3,240.10 principal and $929.50 interest. The plaintiff voluntarily wrote off from the amount of interest recovered $343.60. The court refused the defendants a new trial.

We gather from the record that J. E. Randolph, who was without children, and whose household consisted of himself and wife, about the year 1885 took the plaintiff, then a child of about three years, from an orphanage, and received her into his household as a member of his family, where she remained until his death in 1905. Though of no kin to her, he gave to her his surname, maintained and educated her, and in all respects treated her as a daughter and a member of his household. He was a man in easy circumstances, always provided his household with two servants, and the plaintiff was not called upon to discharge any domestic services, except as are usually rendered by a daughter under like circumstances. Her education was not confined to

cause. After ten months the infant was killed in a railroad accident, and defendant, the infant's administrator, received on a settlement with the railroad the sum of $2,500 as damages in account of the infant's death. Plaintiff then brought action to recover for the value of the support furnished the infant. The court gave judgment for the defendant, saying: "The board of the child was clearly a gratuity, furnished from motives of affection and kindness by the plaintiff, without any expectation of remuneration, or intent to make a claim in the nature of a debt. There is therefore nothing on which an implied contract can rest to charge the assets of the intestate in the hands of the defendant."

See, also, Osier v. Hobbs (1878) 33 Ark. 215, Hanrahan v. Baxter (1908) (Iowa) 116 N. W. 595, 16 L. R. A. (N. S.) 1046.

In Eggers v. Anderson (1901) 63 N. J. Eq. 264, 49 Atl. 578, 55 L. R. A. 570, it was held that charitable donations to the defendant's testatrix, induced by her fraudulent representations as to her means of living, might be recovered in equity.

In Pickslay v. Starr (1896) 149 N. Y. 432, 44 N. E. 163, 32 L. R. A. 703, 52 Am. St. Rep. 740, in accordance with his practice for the last few years, an employer gave his employé a check for a large amount for a Christmas present, acting in momentary forgetfulness of the fact that during the past year an arrangement had been made whereby the employé's salary had been nearly doubled. Some months later, after the employé had gone on a trip to Europe, he was notified that the gift was made by mistake and its repayment demanded. Held, that this gift could not at that late date be avoided by the donor on the ground of mistake.

[3] A portion of the opinion is omitted.

the elementary branches of a common-school education, but she was taught music and art, and graduated from an institution of learning about the year 1899. After her graduation in 1899 she taught school five months, and again taught school in 1901 about five months. She was teaching school in 1905, when, about the 1st of February, she was summoned to the bedside of Mrs. Randolph, who died about a month later, and about a month thereafter Mr. Randolph died. Mr. Randolph owned several small tenant houses near a factory, some storehouses, and some land. He also conducted an undertaking business in Jefferson, a town of 1,500 or 1,800 population. When the plaintiff was about 12 or 14 years of age, she began to assist Mr. Randolph in dressing coffins as he would sell them, and she assisted in collecting the rents from the small houses, and in keeping his accounts with respect to these matters. To what extent she assisted in the collection of rents, and the character of the accounts which she and Mr. Randolph kept appertaining to the rent and undertaking business, does not appear with much precision in the record. Mr. Randolph was accustomed to use intoxicants, and sometimes got drunk, and the plaintiff always ministered unto his wants on these occasions. Whenever Mrs. Randolph was sick, she would nurse her. Mr. Randolph left an estate of about $60,000, and in his will bequeathed to the plaintiff $1,000 in cash and a third interest in the undertaking business, from which she realized $450. The whole evidence tended to show that the relations between the plaintiff and Mr. Randolph and his wife were cordial, and such as might be expected between parent and child. No hint of unkind, disrespectful, or inconsiderate treatment from one to the other is suggested.

1, 2. Until majority the child remains under the control of the father, who is entitled to its services and the proceeds of its labor. Civ. Code, § 2502. Likewise one who stands in loco parentis to such a child is entitled to the proceeds of its labor, and is bound for its care, maintenance, and support. Eaves v. Fears, 131 Ga. 820, 64 S. E. 269. A person who means to put himself in the situation of the lawful father of the child stands, with respect to the father's office and duty of making provision for the child, in loco parentis to the child. Brinkerhoff v. Merselis, 24 N. J. Law, 683; Powys v. Mansfield, 19 Vesey, Jr., 154. Sir William Grant said that one sustained this relation "by assuming the parental character and discharging parental duties." Weatherby v. Dixon, 19 Vesey, Jr., 412. Where a person voluntarily assumes the relation of a parent to a child, whom he is under no obligation to support, and faithfully discharges the duties of that relation by receiving such child into his family and educating and supporting him on the same footing as if the child were his own, in the absence of an express agreement the child cannot maintain an action against such person for services rendered while a minor, although the value of such services may exceed the expenses of such education and support. Under such

circumstances a promise to pay wages will not be implied. Williams v. Hutchinson, 3 N. Y. 312, 53 Am. Dec. 301; Tyler v. Burrington, 39 Wis. 376. As was said in Schrimpf v. Settegast, 36 Tex. 296: "The weight of authority has established a doctrine that would hold a person who had, through motives of kindness or charity, received an orphan child into his family, whether it be a stepchild or an entire stranger, and treated it as a member of his family, as standing in loco parentis, so long as such child should see fit to remain in such family, or so long as it should be permitted thus to remain; and while that relation should exist, the party who stood in loco parentis would be bound for the maintenance, care, and education of such child, and would be entitled to his reasonable services, without being liable to pay for the same, only in the way of support, unless there had been an express promise to that effect."

The record is silent as to whether the plaintiff, at the time she was received into the family of the defendant's testator, had father or mother or any one else to whom she could look for support and maintenance. As she was taken from an orphanage at such a tender age, we may indulge the inference that she was an orphan. Her introduction into the family of Mr. Randolph was as a member of his household. Indeed, the plaintiff only begins to claim remuneration for services rendered after she had been in the household of her benefactor for some eight or nine years. At the time she was taken from the orphanage she was altogether too young to raise any inference that she was to be requited for services. There is no conflict in the testimony that Mr. Randolph faithfully discharged his assumed duty of a foster parent during the minority of the plaintiff; and consequently his estate is not liable for services rendered during her minority. There are several reported cases in this state (Hudson v. Hudson, 90 Ga. 581, 16 S. E. 349; Phinazee v. Bunn, 123 Ga. 230, 51 S. E. 300) where recoveries were sustained in suits by children against parents upon implied contract; but in these cases compensation was claimed for services rendered after the child's majority.

3. The plaintiff embraced in her suit items for services rendered subsequently to her majority. With respect to her right to compensation for services rendered since her majority, it may be stated as a general rule that, when services are rendered and voluntarily accepted, the law will imply a promise on the part of the recipient to pay for them. There are exceptions to, and limitations upon, this general rule, one of which is that, where services are rendered by members of a family living in one household, no such implication will arise from the mere rendition and acceptance of the service. This exception is not confined to cases where the parties sustain the relation of parent and child, but is extended also to strangers who have been received into the family as members of the household. Williams v. Hutchinson, Tyler v. Burrington, supra; Hogg v. Laster, 56 Ark. 382, 19 S. W. 975; Scully v. Scully, 28 Iowa, 548. The reason for the exception is thus

stated by Chancellor McGill: "The household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the members of the family, and are gratuitously performed; and where that relation appears, the ordinary implication of a promise to pay for services does not arise, because the presumption which supports such implication is nullified by the presumption that between members of a household services are gratuitously rendered. The proof of the services and as well as the family relation leaves the case in equipoise, from which the plaintiff must remove it, or fail." Disbrow v. Durand, 54 N. J. Law, 343, 24 Atl. 545, 33 Am. St. Rep. 678. Therefore, where one who has been received in infancy into a family not of kin to her seeks to recover for services rendered to such family after her majority, the burden is upon her to show either an express contract, or circumstances from which a contract of remuneration for such services may be implied. What circumstances might be sufficient to imply a promise to pay for services rendered would depend upon the special facts of the case, taking into account the nature of the services, the relation of the parties, declarations made at the time, indicating an intent of the recipient to compensate for the services rendered, and the like.

As the case is to be tried again, we will forbear a discussion of the evidence submitted as a basis for such inference, further than to say that there was sufficient evidence to submit to the jury the plaintiff's right to recover for services rendered after she attained her majority. * * *

Judgment reversed. All the Justices concur.[4]

[4] Accord: Hertzog v. Hertzog (1857) 29 Pa. 465, page 24, supra (father and married son); Disbrow v. Durand (1892) 54 N. J. Law, 343, 24 Atl. 543, 33 Am. St. Rep. 678 (brother and sister); Dye v. Kerr (1851) 15 Barb. (N. Y.) 444 (parent and child); Houck v. Houck (1882) 99 Pa. 552 (father and married daughter); Dunlap v. Allen (1878) 90 Ill. 108 (parties not related, but plaintiff treated as member of family).

Where the facts show a mutual intention that compensation be given, a recovery is allowed, despite the family relationship. Lillard v. Wilson (1903) 178 Mo. 145, 77 S. W. 74; Mathias v. Tingey (1911) 39 Utah, 561, 118 Pac. 781, 38 L. R. A. (N. S.) 749. In the latter case an adult daughter, who had for many years lived apart from her mother and supported herself, postponed her own marriage, returned home, and for two years nursed her mother, who was unwell and at times helpless, until the mother's death. No express agreement for compensation was shown. The court upheld a verdict for the plaintiff, saying: "If from all the facts and circumstances surrounding the parties, and under which the services were commenced and rendered, it can be reasonably inferred that the child expected to receive remuneration, and the parent intended to pay for the services, a promise to pay therefore may be implied."

Some few jurisdictions seem to require proof of an express promise. Zimmerman v. Zimmerman (1889) 129 Pa. 229, 18 Atl. 129, 15 Am. St. Rep. 720; Hinkle v. Sage (1902) 67 Ohio St. 256, 65 N. E. 999.

The authorities are collected in a note in 11 L. R. A. (N. S.) 873.

In Boardman v. Ward (1889) 40 Minn. 399, 42 N. W. 202, 12 Am. St. Rep. 749, the defendant was the guardian of the plaintiff, who was an orphan. Plaintiff lived in defendant's house during her minority, and continued to do so after attaining her majority, defendant inducing in her the belief that she was considered by him as a member of his family. Upon learning that de-

OSBORN v. GOVERNORS OF GUY'S HOSPITAL.

(At Guildhall, before Raymond, C. J., 1727. 2 Strange, 728.)

The plaintiff brought a quantum meruit pro opere et labore in transacting Mr. Guy's stock affairs in the year 1720. It appeared he was no broker, but a friend; and it looked strongly, as if he did not expect to be paid, but to be considered for it in his will. And the Chief Justice directed the jury, that if that was the case, they could not find for the plaintiff, though nothing was given him by the will; for they should consider how it was understood by the parties at the time of doing the business, and a man who expects to be made amends by a legacy, cannot afterwards resort to his action.[5]

fendant had been drawing upon her funds to pay for her support and maintenance, she sued the defendant for the value of her services. The court affirmed a judgment in plaintiff's favor, saying that defendant, having elected to treat her as his ward and charge her for her board and lodging, "will not now be permitted to change his ground, and take advantage of her ignorance and his fraud to treat her as a member of his family, so as to defeat her claim for services. Under such circumstances the law will raise an obligation to pay what the services are reasonably worth, and assumpsit will lie to recover the same."

Compare Hickam v. Hickam (1891) 46 Mo. App. 496 (defendant after the Emancipation Proclamation fraudulently induced plaintiff to continue in his service and to work without compensation in the belief that she was still a slave; recovery allowed); and Livingston v. Ackeston (1826) 5 Cow. (N. Y.) 531 (a freedman worked for defendant without pay, both parties believing that plaintiff was defendant's slave; recovery denied). See, also, Cooper v. Cooper, page 439, infra; Patterson v. Prior, page 584, infra.

[5] Accord: Little v. Dawson (1791) 4 Dall. (Pa.) 111, 1 L. Ed. 763; Messier v. Messier (1912) 34 R. I. 233, 82 Atl. 996, semble.

But where there was a mutual intention that a charge be made for the services, the postponement of the presentation of a bill in the hope of receiving a legacy does not deprive the plaintiff of his right to recover compensation for such services. Baxter v. Gray (1842) 4 Scott, N. R. 374; Grandin v. Reading (1855) 10 N. J. Eq. (2 Stockton) 370.

Compare Crane v. Ganung (1903) 89 App. Div. 398, 85 N. Y. Supp. 975.

"Where, from the circumstances of the case, it is manifest that it was understood by both parties that compensation should be made by will [for services rendered], and none is made, an action lies to recover what the services were reasonably worth." Von Carlowitz v. Bernstein (1902) 28 Tex. Civ. App. 8, 66 S. W. 464; Martin v. Wright's Administrators (1835) 13 Wend. (N. Y.) 460, 28 Am. Dec. 468; Davison v. Davison (1861) 13 N. J. Eq. 246; Messier v. Messier (1912) 34 R. I 233, 82 Atl 996. Compare Gay v. Mooney, page 315, supra.

CLARY v. CLARY.

(Supreme Judicial Court of Maine, 1899. 93 Me. 220, 44 Atl. 921.)

Exceptions from superior court, Kennebec county.

Assumpsit for defendant's board by the plaintiff on the following account annexed to the writ:

"Filmore R. Clary to Sarah A. Clary, Dr.

"To board, care, and nursing from December 25, 1896, to and inclusive of Apr. 1, 1897, 13 weeks and 5 days, at $4.50 per week..... $61 71"

The case was tried to a jury in the superior court for Kennebec county, where a verdict was returned for the plaintiff, and defendant excepts.

FOGLER, J. This is an action of assumption upon an account annexed to the writ, wherein the plaintiff sues to recover for board and nursing furnished by her to the defendant. The verdict was for the plaintiff, and the case comes here on motion for new trial and on exceptions to the rulings and instructions of the judge of the superior court for the county of Kennebec, before whom the case was tried. The plaintiff and the defendant were formerly husband and wife, but had been divorced some time before the time included in the account sued.

The testimony discloses that on or about the middle of January, 1897, the defendant, being sick and out of work, came to the plaintiff's house, and boarded with her, with her consent, until the 20th of the following March, and was nursed by her during a portion of that time. Before the defendant so commenced to board with the plaintiff, the plaintiff and the defendant had mutually promised each other to remarry, and such marriage contract existed during all the time that the defendant boarded with the plaintiff. Subsequently, and before the commencement of this suit, the defendant married another woman. The plaintiff does not rely upon an express promise on the part of the defendant to pay for such board and nursing, but claims that a promise is implied by law, under the circumstances of the case. The plaintiff testified, on cross-examination, as follows: "Q. Now, when he came there the 1st of January, sick, as you say, and you had made up your mind to marry him again, and had promised to marry him again, did you intend to charge him pay for his board? A. No, sir; if he married me. Q. Did you tell him that? A. No, sir; because the bill was not talked over. Q. When he came there, and when you washed his feet and nursed him, and made up his bed, and got his victuals for him, did you have any intention in your mind at that time to charge him for those things? A. No, sir; I did not, at that time. Q. When was it that you made up your mind to charge him? A. I never made up my mind to ask him anything for board until the last time I was down and settled with you. Q. What date? A. I think it was November 11th. Q. So that, as you say, you never intended to charge him anything for

his board and nursing until you came to me, in November? A. No, sir; I did not."

On redirect, the plaintiff testified: "When he came there, there was an understanding that I should marry him. I never at any time agreed with him that he should not pay board. Nothing was said between Mr. Clary and me in regard to his board."

The case of La Fontain v. Hayhurst, 89 Me. 388, 36 Atl. 623, 56 Am. St. Rep. 430, is almost identical in point of fact, and precisely identical in point of law, with the case at bar, and is decisive against the right of the plaintiff to maintain this action. There, as here, the plaintiff sued the defendant for board. Before such board was furnished the defendant had promised to marry the plaintiff, but subsequently married another woman. The plaintiff testified that at the time such board was furnished she did not intend to charge the defendant therefor. In that case, as in this, board was not furnished in consideration of a promise of marriage, but, rather, on account of the relations existing between the parties by reason of such a prior promise.

In La Fontain v. Hayhurst, supra, the court, after stating the well-settled doctrine that no binding promise to make compensation can be implied or inferred in favor of one party against another, unless the one party (the party furnishing the consideration) then expected, and from the language or conduct of the other party, under the circumstances, had reason to expect, such compensation from the other party,* held that, as the plaintiff did not expect compensation for the board furnished in money or money's worth, the plaintiff could not recover. Following the decision in that case, it is clear that, in the case at bar, the action is not maintainable, and the motion for new trial must be sustained.

We perceive no error in the rulings and instructions of the presiding judge to which exceptions are taken, and the exceptions should be overruled.

Exceptions overruled. Motion sustained. New trial granted.[6]

*In Thomas v. Thomasville Shooting Club (1897) 121 N. C. 238, 28 S. E. 293, plaintiff performed services for defendant without expectation of compensation, but defendant at the time expected to pay for them. Held, that plaintiff might recover the value of such services. See Woodward, Quasi Contracts, § 47.

[6] "If a person has made his addresses to a lady for some time, upon a view of marriage, and, upon reasonable expectation of success, makes presents to a considerable value, and she thinks proper to deceive him afterwards, it is very right that the presents themselves should be returned, or the value of them allowed to him: but, where presents are made only to introduce a person to a woman's acquaintance, and by means thereof to gain her favour, I look upon such person only in the light of an adventurer, especially where there is a disproportion between the lady's fortune and his, and therefore, like all other adventurers, if he will run risques, and loses by the attempt, he must take it for his pains." Lord Chancellor Hardwicke in Robinson v. Cumming (1742) 2 Atk. 409.

In Williamson v. Johnson (1890) 62 Vt. 378, 20 Atl. 279, 9 L. R. A. 277, 22 Am. St. Rep. 117, plaintiff made a gift of money to his fiancée to buy her

COOPER v. COOPER.

(Supreme Judicial Court of Massachusetts, 1888. 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721.)

Exceptions from superior court, Suffolk county; Bacon, Judge.

W. ALLEN, J.[7] The plaintiff and James W. Cooper intermarried in the year 1869, and lived together as husband and wife until his death, in 1885. After his death, the plaintiff learned that a former wife, from whom he had not been divorced, was living, and brought this action of contract against his administrator, to recover for work and labor performed by her as housekeeper while living with the intestate. The court correctly ruled that when the parties lived together as husband and wife there could be no implied promise by the husband to pay for such work. The legal relations of the parties did not forbid an express contract between them, but their actual relations, and the circumstances under which the work was performed, negatived any implication of an agreement or promise that it should be paid for. Robbins v. Potter, 11 Allen, 588, 98 Mass. 532. The case at bar cannot be distinguished from that cited, unless upon the grounds that the plaintiff believed that her marriage was legal, and that the intestate induced her to marry him by falsely representing that he had been divorced from his former wife. But the fact that the plaintiff was led by mistake or deceit into assuming the relation of a wife, has no tendency to show that she did not act in that relation; and the fact that she believed herself to be a wife excludes the inference that the society and assistance of a wife which she gave to her supposed husband was for hire. It shows that her intention in keeping his house was to act as a wife and mistress of a family, and not as a hired servant. There was clearly no obligation to pay wages arising from contract; and the plaintiff's case is rested on the ground that there was an obligation or duty imposed by law from which the law raises a promise to pay money, upon which the action can be sustained.

The plaintiff's remedy was by an action of contract for breach of promise to marry, or, if she was induced to marry by false representations, of tort for the deceit. Blossom v. Barrett, 37 N. Y. 434, 97 Am. Dec. 747. Her injury was in being led by the promise or the deceit to give the fellowship and assistance of a wife to one who was not her

trousseau. After making her purchases, defendant broke her engagement with plaintiff and married another man. The court held that the gift was not absolute, but conditional, and that when the condition failed a right of action accrued to plaintiff in assumpsit for money had and received to recover the money.

Compare Cook v. Bates (1896) 88 Me. 455, 34 Atl. 266.

[7] The statement of facts is omitted.

husband, and to assume and act in a relation and condition that proved to be false and ignominious. The duty which the intestate owed to her, was to make recompense for the wrong which he had done to her. It is said that from this duty the law raised a promise to pay her money for the work performed by her in housekeeping. The obligation to make compensation for the breach of contract could be enforced only in an action upon the contract. The obligation to make recompense for the injury done by the tort was imposed by law, and could be enforced only in an action of tort. It was not a debt or duty upon which the law raised a promise which would support an action of contract. The same act or transaction may constitute both a cause of action in contract and in tort, and a party may have an election to pursue either remedy, and in that sense may be said to waive the tort and sue in contract. But a right of action in contract cannot be created by waiving a tort, and the duty to pay damages for a tort does not imply a promise to pay them, upon which assumpsit can be maintained. Jones v. Hoar, 5 Pick. 285; Brown v. Holbrook, 4 Gray, 102; Ferguson v. Carrington, 9 Barn. & C. 59. See, also, Metc. Cont. 9, 10; 1 Chit. Cont. 87; Earle v. Coburn, 130 Mass. 596; Milford v. Com., 144 Mass. 64, 10 N. E. Rep. 516.

But the objection to maintaining the plaintiff's action lies deeper. The work and labor never constituted a cause of action in tort. The plaintiff could have maintained no action of tort against the intestate for withholding payment for her work and labor in housekeeping, or for, by false representations, inducing her to perform the work without pay. The particular acts which she performed as a wife were not induced by the deceit, so that each would constitute a substantial cause of action, but by the position which she was deceived into assuming, and would be elements of damage in an action for that deceit. Labor in housekeeping was a small incident to a great wrong, and the intestate owed no duty, and had no right to single that out and offer payment for it alone, and the offer to do so might well have been deemed an aggravation of the injury to the plaintiff.

We have been referred to Higgins v. Breen, 9 Mo. 497, and Fox v. Dawson, 8 Mart. (O. S.) (La.) 94, as decisions contrary to the conclusion which we have reached. It does not appear upon what ground the latter case was decided. The former was decided in favor of the defendant, the administrator, upon technical grounds, but the question of his liability was considered. It was assumed that an action of contract could have been maintained against the intestate for work and labor, and the question discussed was whether the action would survive against his administrator, and it was held that it would. Upon the evidence in the present case we think that no action, certainly no action of contract for the cause of action declared on, could have been maintained against the intestate. Even if the intestate had been liable in tort, we are not prepared to assent to the proposition that an action of

contract will lie against an administrator for a tort of his intestate, for which no action of contract could have been sustained against him.

In the opinion of a majority of the court, the entry must be: Exceptions overruled.[8]

ULMER v. FARNSWORTH.

(Supreme Judicial Court of Maine, 1888. 80 Me. 500, 15 Atl. 65.)

DANFORTH, J. The plaintiffs are the owners of a lime quarry, in which they have a pump used for the purpose of draining their quarry from such water as may accumulate therein, whether coming from sources within its own limits or outside. The defendant owns another quarry adjacent to, but not adjoining, the plaintiffs', there being one quarry between them. It is alleged that water accumulates in the defendant's quarry, and, running through the one intervening, comes upon that of the plaintiffs', and is pumped up by them. It is to recover compensation for this service that this action is brought, the plaintiffs alleging that the defendant receives benefit from it, as it prevents the injurious accumulation of water in his own quarry. The action is assumpsit, and must therefore be maintained, if at all, upon proof of a promise, express or implied. The case shows no sufficient proof of an express promise. Nor will the facts proved, independent of the alleged custom or usage relied upon by the plaintiffs, raise an implied promise. The pump by which the service was performed was situated in the plaintiffs' quarry, put there primarily for the purpose of draining their own premises. The running of the water from the defendant's quarry to the plaintiffs' was the result of the plaintiffs' own act in digging theirs deeper than the other. The benefit accruing to the defendant, if any, was merely incidental, with no legal right to interfere with the operation of the pump, and hence under no obligation to give notice of a denial of liability. These circumstances could not raise an implied promise on the part of the defendant,—certainly not if he was guilty of no wrong in permitting the water to run as it did, and if he was guilty the remedy would be in another form of action; and, when we add to this the unqualified and uncontradicted denial of the defendant that any contract was made, we must come to the conclusion that the testimony not only fails to sustain a promise, but that in fact none, either express or implied, ever existed.

But the plaintiffs rely upon an alleged custom or usage in that neigh-

[8] Accord: Payne's Appeal (1895) 65 Conn. 397, 32 Atl. 948, 33 L. R. A. 418, 48 Am. St. Rep. 215. Contra: Higgins v. Breen (1845) 9 Mo. 497.

Where the plaintiff is aware that the cohabitation is illicit, such guilty knowledge is of itself a reason for denying recovery. Swires v. Parsons (1843) 5 Watts & S. (Pa.) 357. Brown v. Tuttle (1888) 80 Me. 162, 13 Atl. 583.

Contra: Succession of Llula (1892) 44 La. Ann. 61, 10 South. 406 (on the ground that the illicit relation was incidental and not the motive of the parties living together).

borhood by which, under like circumstances, the parties receiving this incidental benefit have recognized a liability to pay a certain specified sum (one cent) for each cask of lime burned from the rock taken out of the quarry thus drained. It is claimed that this usage of itself raises an implied promise on the part of the defendant.[9] * * * This action must therefore fail, whatever remedy may be open to the plaintiffs in a process of a different form. Judgment for defendant.[10]

[9] The court, in a portion of the opinion which is here omitted, held that such a usage to make payment for this service was not proved with sufficient definiteness, and further, that, being a local usage, it could not be received "to impose a contract liability in direct opposition to the established principle of law requiring assent to a binding contract."

[10] In United States v. Pacific Railroad (1887) 120 U. S. 227, 7 Sup. Ct. 490, 30 L. Ed. 634, it was held that the United States government could not claim reimbursement from the defendant railroad company for rebuilding for military purposes, during the Civil War, certain bridges on defendant's line which had been destroyed in the course of military operations; Field, J., saying, (120 U. S. 239, 240, 7 Sup. Ct. 496, 30 L. Ed 634): "Private parties cannot be charged for works constructed on their lands by the government to further the operation of its armies. * * * Military necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the government. The cost of building and repairing roads and bridges to facilitate the movements of troops, or the transportation of supplies and munitions of war, must, therefore, be borne by the government. It is true that in some instances the works thus constructed may, afterwards, be used by the owner; a house built for a barrack, or for the storage of supplies, or for temporary fortification, might be converted to some purposes afterwards by the owner of the land, but that circumstance would impose no liability upon him. Whenever a structure is permanently affixed to real property belonging to an individual, without his consent or request, he cannot be held responsible because of its subsequent use. It becomes his by being annexed to the soil; and he is not obliged to remove it so as to incur an obligation to pay for it, merely because he has not chosen to tear it down, but has seen fit to use it."

In Ruabon Steamship Co. v. London Assurance, [1900] A. C. 6, it appeared that during a voyage covered by a policy of marine insurance a vessel was damaged by a peril insured against and was therefore put into dry dock for the necessary repairs. The survey of the vessel for renewing her classification was not due, but the owners (without causing delay or increase of dock expenses) took advantage of her being in dry dock to have the survey made and her classification renewed. The House of Lords held that the expenses of getting the vessel into and out of the dock, as well as those incurred in the use of the dock, fell upon the underwriters alone, and could not be apportioned between them and the owners, on the ground that "there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it."

See, also, Loring v. Bacon, 4 Mass. 575.

If plaintiff performs services pursuant to a contract between plaintiff and a third party, the fact that such services have benefited defendant imposes no obligation on defendant to remunerate plaintiff. Coleman v. United States (1894) 152 U. S. 96, 14 Sup. Ct. 473, 38 L. Ed. 368 (plaintiff's performance of legal services for his client benefited defendant); Cahill v. Hall (1894) 161 Mass. 512, 37 N. E. 573 (plaintiff trained defendant's colt under a contract with defendant's son).

GRIFFIN v. SANSOM.

(Court of Civil Appeals of Texas, 1903. 31 Tex. Civ. App. 560, 72 S. W. 864.)

Appeal from Hill County Court; L. C. Hill, Judge.

Action by L. H. Sansom against John R. Griffin. Judgment for plaintiff, and defendant appeals.

TEMPLETON, J. A party wall which stood on the dividing line between the lots of Sansom and Griffin was destroyed by natural causes. The wall was rebuilt by Sansom, and he brought this suit against Griffin to recover one-half the cost of rebuilding. A trial resulted in a judgment in favor of the plaintiff, and the defendant appealed.

It was alleged in the plaintiff's petition "that the defendant had notice of the rebuilding of said wall, one-half on plaintiff's and one-half on defendant's lot, and it was so rebuilt with the knowledge and consent of defendant; that said defendant agreed that said wall be rebuilt, and promised to do what was right about his part of same; that defendant meant and promised thereby to pay for his part, or one-half of same; that plaintiff, relying thereon, rebuilt the wall; and that the defendant thereby became indebted to plaintiff for one-half of said wall so rebuilt by plaintiff." On the trial the plaintiff testified as follows: "When I went to rebuild the division wall between my lot and defendant's, I went to defendant and asked him to help me rebuild it, and he told me that it might be two or three years before he would use it, and he would not help me build it back. I asked him if he did not expect to build there some time, and he said 'Yes,' and I said then why not help me build it back. That is all the conversation I think we had. * * * When I went to rebuild the wall, I went to him and told him about going to rebuild; and he told me in this connection just what I stated a while ago, and I told him that he had to pay for one-half the wall. He never made any objection to paying for one-half the wall. He knew of my rebuilding the wall, and never objected to it."

It is manifest that this testimony does not establish the promise or agreement alleged, and that if the plaintiff's petition does not state a cause of action, independent of such promise or agreement, the judgment in his favor was not warranted. It was alleged in the petition that after the plaintiff had rebuilt the wall the defendant joined to and made use of the same. That fact would not, of itself alone, render the defendant liable for any part of the cost of rebuilding. The owner of real estate may lawfully appropriate to his own use improvements which have been voluntarily placed thereon by another, without becoming liable for the value of such improvements. Antomarchi's Ex'r v. Russell, 63 Ala. 356, 35 Am. Rep. 40. The defendant herein was under no legal obligation to assist in rebuilding the wall, and mere knowledge on his part that the plaintiff was rebuilding the wall would not create such obligation. If, however, the plaintiff built the wall with the ex-

pectation that the defendant would, when he got ready to make use of the same, pay part of the cost of construction, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him so to act without objection, then the defendant, when he joined to and made use of the wall, would become liable to the plaintiff for one-half of the cost of the wall. Day v. Caton, 119 Mass. 513, 20 Am. Rep. 347. No such cause of action is set up in the petition, and no other theory of liability is suggested by the evidence. The judgment will be reversed, and the cause remanded.

Reversed and remanded.[11]

[11] Contra: Spaulding v. Grundy, 126 Ky. 510, 104 S. W. 293, 13 L. R. A. (N. S.) 149, 128 Am. St. Rep. 328, 15 Ann. Cas. 1105.

For a collection of the authorities and a discussion of the statutes found in some states, see note in 66 L. R. A. 705, 706.

RECOVERY FOR IMPROVEMENTS.—At common law an occupant of land in good faith and under color of title, who makes improvements on the land and is thereafter ousted by the true owner, cannot recover for the value of such improvements. Webster v. Stewart (1858) 6 Iowa, 401. Some decisions allow a recovery in equity. Bright v. Boyd (1841) 1 Story (U. S. C. C.) 478, Fed. Cas. No. 1,875. But the weight of authority is contra. Putnam v. Ritchie (1837) 6 Paige (N. Y.) 390; Anderson v. Reid (1899) 14 App. D. C. 54. Yet, on the principle that he who seeks equity must do equity, if the owner of the property resorts to a court of equity to establish his rights, as a condition of relief such owner must make compensation for improvements made by the bona fide occupant. Skiles' Appeal (1885) 110 Pa. 248, 20 Atl. 722; Thomas v. Evans (1887) 105 N. Y. 601, 12 N. E. 571, 59 Am. Rep. 519. And on the same principle, if the owner brings an action for mesne profits, the bona fide occupant may set off or recoup the value of his improvements. Jackson v. Loomis (1825) 4 Cow. (N. Y.) 168, 15 Am. Dec. 347; Ege v. Kille (1877) 84 Pa. 333.

The harshness of the common-law doctrine has resulted in statutory enactments known as "Betterment Acts," or "Occupying Claimants Acts," under which the bona fide occupant is given a lien on the land for an amount equal to the extent to which his improvements have enhanced its value. Griswold v. Bragg (C. C. 1880) 48 Fed. 519; Wakefield v. Van Tassell (1905) 218 Ill. 572, 75 N. E. 1058.

Similarly, in the case of improvement of personalty by an innocent trespasser, no relief is allowed by direct action at law. Isle Royale Mining Co. v. Hertin (1877) 37 Mich. 332, 26 Am. Rep. 520; Gaskins v. Davis (1894) 115 N. C. 85, 20 S. E. 188, 25 L. R. A. 813, 44 Am. St. Rep. 439. But when such innocent trespasser is sued for conversion he is allowed to reduce the damages to the value of the goods at the time and place of conversion. Wooden-Ware Co. v. United States (1882) 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230; Trustees of Dartmouth College v. International Paper Co. (C. C. 1904) 132 Fed. 92. See, also, State v. Shevlin Carpenter Co. (1895) 62 Minn. 99, 64 N. W. 81.

Compare Ford v. Stroud, and note thereto, page 335, supra.

SECTION 2.—PLAINTIFF ACTED WITH INTENTION OF CLAIMING COMPENSATION

INHABITANTS OF SOUTH SCITUATE v. INHABITANTS OF HANOVER.

(Supreme Judicial Court of Massachusetts, 1857. 9 Gray, 420.)

Action of contract to recover half the fees paid by the plaintiffs to the commissioners appointed by the governor to establish the boundary line between South Scituate and Hanover, under the Resolve of 1856, c. 79, which provided "that the said towns of South Scituate and Hanover shall be required to defray the expenses of said commission, each of said towns paying one half of said expenses." The plaintiffs had paid the whole fees, without being requested by the defendants so to do.

BIGELOW, J. There is nothing in the facts of this case from which a promise by the defendants, either express or implied, can be inferred to pay the plaintiffs the money sought to be recovered in this action. It is true that the defendants were legally liable, under the resolve of the legislature of May 31, 1856, to pay one half of the expenses of the commission appointed to establish the boundary line between the towns of South Scituate and Hanover. But this was a liability either to the commissioners or to the Commonwealth, and not to the plaintiffs. There is no provision in the resolve, authorizing or requiring the plaintiffs to pay the whole expenses, and rendering the defendants liable for one half thereof to the plaintiffs. It was a voluntary payment by the plaintiffs of a debt due from the defendants. Such payment gives no cause of action. It falls within the well settled rule of law, that the payment of the debt of another raises no assumpsit against the person whose debt is paid, and no action will lie by reason of such payment, unless a request, either express or implied, to make the payment is proved. The law does not permit the liability of a party for a debt to one person to be shifted so as to make him debtor to another without his consent. Winsor v. Savage, 9 Metc. 348.

Judgment for the defendants.[12]

[12] In Stokes v. Lewis (1785) 1 T. R. 21, two parishes employed a common sexton for £20. per year, each parish paying £10. Pending a dispute as to the right of one parish to choose its own sexton, the other parish chose a sexton, paid him £20. for the first year, and sued the first parish for a moiety thereof. Held for defendant: Lord Mansfield, C. J., saying: "One parish paid the quota of the other in spite of their teeth; then can it be said that this action for money paid, laid out and expended, will lie? Certainly not. The action must be grounded either on an express or implied consent; here is neither."

In Jones v. Wilson (1808) 3 Johns. (N. Y.) 434, plaintiff, a constable, receiving an execution against defendant issued at suit of a third party, paid the amount thereof to such third party without making any demand on the de-

NOBLE v. WILLIAMS.

(Supreme Court of Kentucky, 1912. 150 Ky. 439, 150 S. W. 507, 42 L. R. A. [N. S.] 1177.)

Appeal from Circuit Court, Breathitt County.

Action by E. J. Noble and others against Kash C. Williams and others. From a judgment for defendants, plaintiffs appeal.

WINN, J. According to the allegations of the petition, the appellants, the plaintiffs, were hired to teach the public school in Jackson, Ky., for the fall term of 1908. The school board failed to pay rent for the schoolhouse, to buy the coal, to furnish the seats, crayons, blackboards, and the like, incident and necessary to the conduct of the school. Plaintiffs allege that they, in order to conduct the school, were obliged to and did pay the rent and buy these supplies. They allege no request by the school board that they should do so, nor any promise by the board to reimburse them. They sought to recover, nevertheless,

fendant and without his request. Held, that plaintiff could not maintain action against defendant for the money so paid.

In McGlew v. McDade (1905) 146 Cal. 553, 80 Pac. 695, the plaintiff, a brother of the defendant's intestate, paid a debt due for professional services of a physician during the intestate's last illness, without taking an assignment of the claim and without being requested to make such payment. Held for the defendant: "The estate was not bound to accept the plaintiff as its creditor without its consent."

In Bateson v. Phelps' Estate (1906) 145 Mich. 605, 108 N. W. 1079, the plaintiff, by mistake, paid taxes erroneously assessed to him upon real estate owned by the decedent. Held, plaintiff could not recover from decedent's estate the amount of such payment, as the payment was voluntary. "It may be that in equity the plaintiff should be reimbursed for the amount so paid."

See, also, Kershaw County v. Town of Camden (1890) 33 S. C. 140, 11 S. E. 635; Hotchkiss v. Williams (1899) 44 App. Div. 615, 60 N. Y. Supp. 168; City of Chicago v. C. & N. W. Ry. Co. (1900) 186 Ill. 300, 57 N. E. 795.

It is generally held that a subsequent promise of reimbursement by the one whose debt has been paid is without consideration and unenforceable. Eastwood v. Kenyon (1840) 11 Ad. & El. 436; Massachusetts Mutual Life Ins. Co. v. Green (1904) 185 Mass. 306, 70 N. E. 202; Thomson v. Thomson (1902) 76 App. Div. 178, 78 N. Y. Supp. 389. Contra: Wright v. Farmers' Nat. Bank (1903) 31 Tex. Civ. App. 406, 72 S. W. 103; also cases cited in note in 53 L. R. A. 372.

Nor can the one who has voluntarily paid another's debt recover from the creditor. "Nothing is clearer than that, where A. voluntarily pays to B. a debt which C. owes, A. cannot afterwards, upon his failure to collect from C. what he has advanced or paid for him, recover back from B. the amount paid him in satisfaction of his debt against C." Traders' & Truckers' Bank v. Black (1908) 108 Va. 59, 66, 60 S. E. 743.

If a payment is made on behalf of the debtor and is subsequently ratified by him, he must make reimbursement. Ross v. Pearson (1852) 21 Ala. 473; Oliver v. Camp (Ala. 1913) 62 South. 469; Wolff v. Matthews (1890) 39 Mo. App. 376; Neely v. Jones (1880) 16 W. Va. 625, 37 Am. Rep. 794. See, also, Monast v. Marchant (R. I. 1909) 72 Atl. 820.

In Ross v. Pearson, supra, the court said: "Although it is true that money paid voluntarily cannot be recovered back, yet, if the payment is sanctioned and adopted by the debtor, he by that act makes the payor his agent, and the law then implies a promise to refund."

As to the effect of such a payment as that made in the present case upon a subsequent action by the creditor against the debtor, see Williston's Wald's Pollock on Contracts, 840–842; 23 L. R. A. 120, note.

against the appellee board for these expenditures. The circuit court sustained a demurrer to their petition, and they appeal.

The circuit court was right. The teachers, in contracting and paying these obligations, were volunteers. No man, entirely of his own volition, can make another his debtor. The school board could have been required by mandamus, at the suit of any proper party, to furnish a place for the conduct of the school. The teachers had no right to supply it themselves, and then recover the rent. They had their teaching contract; and if the board made it impossible for them to teach, by failing to furnish a place for conducting the school, they had their right of action on their contract, subject to the customary principles involved in such cases. They adopted neither of these courses, but instead voluntarily paid an obligation which was not theirs.

Judgment affirmed.[13]

BOSTON ICE CO. v. POTTER.

(Supreme Judicial Court of Massachusetts, 1877. 123 Mass. 28, 25 Am. Rep. 9.)

Contract on an account annexed, for ice sold and delivered between April 1, 1874, and April 1, 1875. Answer, a general denial.

At the trial in the superior court, before Wilkinson, J., without a jury, the plaintiff offered evidence tending to show the delivery of the ice and its acceptance and use by the defendant from April 1, 1874, to April 1, 1875, and that the price claimed in the declaration was the market price. It appeared that the ice was delivered and used at the defendant's residence in Boston, and the amount left daily was regulated by the orders received there from the defendant's servants; that the defendant, in 1873, was supplied with ice by the plaintiff, but, on account of some dissatisfaction with the manner of supply, terminated his contract with it; that the defendant then made a contract with the Citizens' Ice Company to furnish him with ice; that some time before April, 1874, the Citizens' Ice Company sold its business to the plaintiff, with the privilege of supplying ice to its customers. There was some evidence tending to show that the plaintiff gave notice of this change of business to the defendant, and informed him of its intended supply of ice to him; but this was contradicted on the part of the defendant.

The judge found that the defendant received no notice from the plaintiff until after all the ice had been delivered by it, and that there

[13] In Davis v. School District No. 2 (1844) 24 Me. 349, the defendant voted to lay out ten per cent. of the school money in repairs to the school house. Plaintiff, the district school agent, expended in necessary repairs a sum equal to twice the amount authorized and brought suit for the excess. Held for defendant. The use of the school after the repairs were made raised no implication of a promise to pay therefor. "The principle contended for would oblige one to pay for repairs made upon his buildings without his request or wishes, or to abandon them entirely."

was no contract of sale between the parties to this action except what was to be implied from the delivery of the ice by the plaintiff to the defendant and its use by him; and ruled that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and that the plaintiff could not maintain this action. The plaintiff alleged exceptions.

ENDICOTT, J. To entitle the plaintiff to recover, it must show some contract with the defendant. There was no express contract, and upon the facts stated no contract is to be implied. The defendant had taken ice from the plaintiff in 1873, but, on account of some dissatisfaction with the manner of supply, he terminated his contract, and made a contract for his supply with the Citizens' Ice Company. The plaintiff afterward delivered ice to the defendant for one year without notifying the defendant, as the presiding judge has found, that it had bought out the business of the Citizens' Ice Company, until after the delivery and consumption of the ice.

The presiding judge has decided that the defendant had a right to assume that the ice in question was delivered by the Citizens' Ice Company, and has thereby necessarily found that the defendant's contract with that company covered the time of the delivery of the ice.

There was no privity of contract established between the plaintiff and defendant, and without such privity the possession and use of the property will not support an implied assumpsit. Hills v. Snell, 104 Mass. 173, 177, 6 Am. Rep. 216. And no presumption of assent can be implied from the reception and use of the ice, because the defendant had no knowledge that it was furnished by the plaintiff, but supposed that he received it under the contract made with the Citizens' Ice Company. Of this change he was entitled to be informed.

A party has a right to select and determine with whom he will contract, and cannot have another person thrust upon him without his consent. It may be of importance to him who performs the contract, as when he contracts with another to paint a picture, or write a book, or furnish articles of a particular kind, or when he relies upon the character or qualities of an individual, or has, as in this case, reasons why he does not wish to deal with a particular party. In all these cases, as he may contract with whom he pleases, the sufficiency of his reasons for so doing cannot be inquired into. If the defendant, before receiving the ice, or during its delivery, had received notice of the change, and that the Citizens' Ice Company could no longer perform its contract with him, it would then have been his undoubted right to have rescinded the contract and to decline to have it executed by the plaintiff. But this he was unable to do, because the plaintiff failed to inform him of that which he had a right to know. Orcutt v. Nelson, 1 Gray, 536, 542; Winchester v. Howard, 97 Mass. 303, 93 Am. Dec. 93, Hardman v. Booth, 1 Hurl. & C. 803; Humble v. Hunter, 12 Q. B. Div. 310; Robson v. Drummond, 2 Barn. & Adol. 303. If he had received notice and continued to take the ice as delivered, a contract

would be implied.[14] Mudge v. Oliver, 1 Allen, 74; Orcutt v. Nelson, ubi supra; Mitchell v. Lapage, Holt, N. P. 253.

There are two English cases very similar to the case at bar. In Schmaling v. Thomlinson, 6 Taunt, 147, a firm was employed by the defendants to transport goods to a foreign market, and transferred the entire employment to the plaintiff, who performed it without the privity of the defendants, and it was held that he could not recover compensation for his services from the defendants.

The case of Boulton v. Jones, 2 Hurl. & N. 564, was cited by both parties at the argument. There the defendant, who had been in the habit of dealing with one Brocklehurst, sent a written order to him for goods. The plaintiff, who had on the same day bought out the business of Brocklehurst, executed the order without giving the defendant notice that the goods were supplied by him and not by Brocklehurst. And it was held that the plaintiff could not maintain an action for the price of the goods against the defendant. It is said in that case that the defendant had a right of set-off against Brocklehurst, with whom he had a running account, and that is alluded to in the opinion of Baron Bramwell, though the other judges do not mention it.

The fact that a defendant in a particular case has a claim in set-off against the original contracting party shows clearly the injustice of forcing another person upon him to execute the contract without his consent, against whom his set-off would not be available. But the actual existence of the claim in set-off cannot be a test to determine that there is no implied assumpsit or privity between the parties. Nor can the non-existence of a set-off raise an implied assumpsit. If there is such a set-off, it is sufficient to state that, as a reason why the defendant should prevail; but it by no means follows that because it does not exist the plaintiff can maintain his action. The right to maintain an action can never depend upon whether the defendant has or has not a defence to it.

The implied assumpsit arises upon the dealings between the parties to the action, and cannot arise upon the dealings between the defendant and the original contractor, to which the plaintiff was not a party. At the same time, the fact that the right of set-off against the original contractor could not, under any circumstances, be availed of in an action brought upon the contract by the person to whom it was transferred and who executed it, shows that there is no privity between the parties in regard to the subject matter of this action.

[14] In Barnes v. Shoemaker (1887) 112 Ind. 512, 14 N. E. 367, the court said: "If the person ordering the goods receives notice, before the goods are appropriated or converted, that they have been furnished by another, and is also notified that they are furnished upon such terms as import that the person supplying the goods contemplated a sale upon terms stated, and the person who sent the order afterwards receives and appropriates them, he thereby assents to and ratifies the filling of the order, and such assent and ratification relate back, and give the order the same effect as if it had been originally given to the preson who filled it."

It is, therefore, immaterial that the defendant had no claim in set-off against the Citizens' Ice Company.

We are not called upon to determine what other remedy the plaintiff has, or what would be the rights of the parties if the ice were now in existence. Exceptions overruled.[15]

CONCORD COAL CO. v. FERRIN.

(Supreme Court of New Hampshire, 1901. 71 N. H. 33, 51 Atl. 283, 93 Am. St. Rep. 496.)

Exceptions from Merrimack county.

Action by the Concord Coal Company against one Ferrin and another. Verdict rendered for defendants, and case transferred on plaintiff's exceptions.

One Bean, being indebted to the defendants for labor upon a model of an appliance invented by him, and having been requested to make payment, informed the defendants that one of the plaintiffs, Day, was backing him, and that he would get the plaintiff company to furnish a ton of coal for application as payment upon his indebtedness; and the defendants agreed to accept a ton of coal in part payment. Bean thereupon informed the plaintiffs that the defendants wanted a ton of coal, without saying anything about the arrangement he had made with them. The coal was delivered to the defendants and used by them in their business. The plaintiffs charged the coal to the defendants. Demand for payment was made upon the defendants by the plaintiffs by letter within six months after the coal was delivered, and again after about a year. An oral demand was subsequently made on several occasions, and the defendants on each occasion denied their liability. The defendants credited the coal to Bean's account. Day was not in fact backing Bean, and had given him no authority to bind him in any way. The defendants knew that the coal came from the Concord Coal Company, and that the plaintiffs were a firm composed of Day and one Emmons. Both parties acted in entire good faith, but were deceived by Bean. The court found a verdict for the defendants, and the plaintiffs excepted.

PARSONS, J. Both parties understood that upon the delivery of the coal the title passed to the defendants. Their misunderstanding related solely to the mode of payment. The plaintiffs understood the defendants were to pay them the customary price, and charged the coal to them. The defendants understood the coal was delivered as a payment upon Bean's indebtedness to them, and credited it upon his account. The plaintiffs understood their delivery was of coal to be paid for in cash in the ordinary course of business. The defendants understood their acceptance was of coal for which they had already

[15] See 7 Columbia Law Review, 32.

paid. To this branch of a contract of sale the parties did not agree in fact, either in terms or by inference. Hence there was no contract in fact, express or tacit (Sceva v. True, 53 N. H. 627, 632), because of the mutual mistake as to payment. As there was no contract of sale, in the absence of any estoppel, upon discovery of the mistake the plaintiffs might have retaken their coal if it remained distinguishable from other coal of the defendants, or the defendants might have required the plaintiffs to remove it. As the plaintiffs had no right of action by virtue of the mistaken acceptance of the coal, they cannot now recover except by virtue of some further facts. The additional facts stated are that the defendants used the coal in their business, and the plaintiffs, within six months and subsequently, made sundry demands for payment. It does not appear that the plaintiffs ever demanded the return of the coal; but, on the contrary, they appear to have uniformly insisted upon the contract as they understood it. In the original transaction both parties acted in entire good faith, but were deceived by Bean. Upon these facts the trial court found a verdict for the defendants. This verdict must stand unless the specific facts found are inconsistent therewith as matter of law.

The plaintiffs' claim is that the defendants by their use of the coal charged themselves with the legal duty of paying for it in accordance with the plaintiffs' understanding of the contract, rather than their own, or at least of paying anew in money the usual price or value of the coal. The question is, how ought the coal to be paid for,—in accord with the understanding of the plaintiffs, or with that of the defendants? It is manifest that if the plaintiffs had accompanied the delivery of the coal with an invoice charging the defendants with the price, or had informed them it was delivered on their credit, or if before delivery the plaintiffs had inquired of the defendants as to Bean's authority, or if the defendants, before accepting the coal, had informed the plaintiffs that they accepted it only for application on Bean's debt, the controversy would have been avoided. Whether, under all the circumstances, the defendants accepted or the plaintiffs delivered the coal under such circumstances that either of them are now estopped to set up their understanding of the transaction, is mainly a question of fact. If it were found that the defendants were thus in default, they would be bound in contract by estoppel (Sceva v. True, supra); while, if the plaintiffs were considered to be similarly estopped, the case would also be determined upon that ground. As the general verdict is found for the defendants, it must be understood at least to embrace a finding that no estoppel exists against the defendants. Bank v. Church, 69 N. H. 582, 44 Atl. 105.

The facts disclose no contract in fact, express, tacit, by estoppel, or implied in fact; and the sole remaining question is whether the facts establish a contract implied in law, or a contract of legal duty, sometimes called a quasi contract. Sceva v. True, supra. A promise to pay what it is one's legal duty to pay is implied by law. Bixby v. Moor,

51 N. H. 402–404; Eastman v. Clark, 53 N. H. 276, 280, 16 Am. Rep. 192; Sceva v. True, 53 N. H. 627, 631–633; Water Co. v. Metcalf, 63 N. H. 427; Gage v. Gage, 66 N. H. 282, 283, 29 Atl. 543, 28 L. R. A. 829; Clark v. Sanborn, 68 N. H. 411, 36 Atl. 14. In this case the legal duty is wanting, unless it can be predicated upon the mere possession and use of property. The mere fact of benefit received is insufficient to establish the legal duty of payment. Clark v. Sanborn, supra, is precisely in point. There the plaintiff was unable to recover for services valuable to the defendants, rendered under the expectation that they would be paid for, for the reason that the defendants did not accept the services with the understanding that they were to make payment. In the absence of privity of contract, the mere possession and use of property will not imply a promise to pay for it. Ice Co. v. Potter, 123 Mass. 28, 25 Am. Rep. 9; Hills v. Snell, 104 Mass. 173, 177, 6 Am. Rep. 216; Boulton v. Jones, 2 Hurl. & N. 564; Benj. Sales, §§ 59, 416. It is contended that the plaintiffs can recover because otherwise the defendants would be unjustly enriched at the plaintiffs' expense. But that fact is not found. Both parties trusted and were deceived by Bean. If the plaintiffs cannot recover of the defendants for the coal, they have a claim against Bean for its value; while, if the defendants were obliged to pay for the coal, they would also have a claim against Bean for the same amount. It may be assumed that Bean is worthless. But there is no equitable reason why the plaintiffs rather than the defendants should be released from the consequences of their trust in Bean. In view of the inference of freedom from fault which the general verdict finds for the defendants, the defendants' equity is at least equal with that of the plaintiffs.

The fact, if it were a fact, as Bean represented to the defendants, that only one of the two partners of the Concord Coal Company was backing him, presents no legal reason why Bean could not, as he represented he could, get the Concord Coal Company to furnish a ton of coal for application upon his account, or why they could not or would not do so. What Bean said and the defendants' knowledge of the composition of the plaintiffs' firm were evidentiary facts bearing upon the question concluded by the general verdict,—whether the defendants were in fault in accepting the coal without inquiry. As no facts are found inconsistent with the general verdict found for the defendants, the verdict cannot be disturbed.

Exceptions overruled.[16]

[16] Compare the cases on benefits conferred under mistake as to the existence of a contract between the parties, page 119 et seq., supra.

In Rohr v. Baker (1886) 13 Or. 350, 10 Pac. 627, plaintiff and defendant were contractors engaged in excavating earth for a street in the city of Portland, and acting under separate contracts. Plaintiff by mistake and without defendant's knowledge excavated a quantity of earth or ground covered by defendant's contract, and brought action to recover for the actual cost of the work done by him, and from which he claimed Baker received a benefit. The court denied relief, saying: "The case presented is that of a stranger doing work on Baker's contract without Baker's consent. The case, in principle,

BARTHOLOMEW v. JACKSON.

(Supreme Court of New York, 1822. 20 Johns 28, 11 Am. Dec. 237.)

In error, on certiorari to a justice's court. Jackson sued Bartholomew before a justice, for work and labor, &c. B. pleaded non assumpsit. It appeared in evidence, that Jackson owned a wheat stubble-field, in which B. had a stack of wheat, which he had promised to remove in due season for preparing the ground for a fall crop. The time for its removal having arrived, J. sent a message to B., which, in his absence, was delivered to his family, requesting the immediate removal of the stack of wheat, as he wished, on the next day, to burn the stubble on the field. The sons of B. answered, that they would remove the stack by 10 o'clock the next morning. J. waited until that hour, and then set fire to the stubble, in a remote part of the field. The fire spreading rapidly, and threatening to burn the stack of wheat, and J., finding that B. and his sons neglected to remove the stack, set to work and removed it himself, so as to secure it for B.; and he claimed to recover damages for the work and labor in its removal. The jury gave a verdict for the plaintiff for 50 cents, on which the justice gave judgment, with costs.

PLATT, J., delivered the opinion of the court. I should be very glad to affirm this judgment; for though the plaintiff was not legally entitled to sue for damages, yet to bring a certiorari on such a judgment was most unworthy. The plaintiff performed the service without the privity or request of the defendant; and there was, in fact, no promise, express or implied. If a man humanely bestows his labor, and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as gratuitous, and it, therefore, forms no ground of action. The judgment must be reversed.

Judgment reversed.[17]

is the same as though he had ploughed Baker's field, or done work on his house, under similar circumstances."

In Forbis v. Inman (1892) 23 Or. 68, 31 Pac. 204, the court held that a subsequent express promise to reimburse plaintiff under circumstances similar to those in Rohr v. Baker, supra, was supported by a sufficient consideration to sustain an action. Accord: Drake v. Bell (1899) 26 Misc. Rep. 237, 55 N. Y. Supp. 945 (but see Thomson v. Thomson [1902] 76 App. Div. 178, 78 N. Y. Supp. 389); Edson v. Poppe (1910) 24 S. D. 466, 124 N. W. 441, 26 L. R. A. (N. S.) 534. See, also, Muir v. Kane (1909) 55 Wash. 131, 104 Pac. 153, 26 L. R. A. (N. S.) 519, 19 Ann. Cas. 1180 (with note on "Moral Obligation as Consideration for an Express Promise"). Contra: Sharp v. Hoopes (1906) 74 N. J. Law, 191, 64 Atl. 989; Conant v. Evans (1909) 202 Mass. 34, 88 N. E. 438.

[17] See also Glenn v. Savage (1887) 14 Or. 567, 577, 13 Pac. 442.

In Merritt v. American Dock & Trust Co. (1891) 13 N. Y. Supp. 234, the plaintiff was the owner of certain steam boats used for the purpose of aiding disabled vessels and extinguishing fires. The captains of two of such vessels seeing defendant's warehouse in flames proceeded thereto and endeavored to extinguish the fire. There was no express request from defendant to render

REEDER v. ANDERSON'S ADM'RS.

(Court of Appeals of Kentucky, 1836. 4 Dana, 193.)

CHIEF JUSTICE ROBERTSON delivered the opinion of the Court.

The only question to be considered in this case, is whether the law will imply a promise by the owner of a runaway slave, to pay a reasonable compensation to a stranger, for a voluntary apprehension and restitution of the fugitive. And, though such friendly offices are frequently those only of good neighborship, which should not be influenced by mercenary motives or expectations—nevertheless, it seems to us that, there is an implied request from the owner, to all other persons to endeavor to secure to him lost property which he is anxious to retrieve; and that, therefore, there should be an implied undertaking to (at least) indemnify any person who shall, by the expenditure of time or money, contribute to a reclamation of the lost property.

Whether, according to the proof, there was any such claim to reparation or indemnity in this case, is very doubtful: but, because it is doubtful, the Circuit Court erred in instructing the jury to find as in case of a nonsuit.

And therefore, it is considered by the Court that, the judgment be reversed, the verdict set aside, and the cause remanded for a new trial.

CHASE v. CORCORAN.

(Supreme Judicial Court of Massachusetts, 1871. 106 Mass. 286.)

GRAY, J.[18] The evidence introduced at the trial tended to prove the following facts: The plaintiff, while engaged with his own boats in the Mystic river, within the ebb and flow of the tide, found the defendant's boat adrift, with holes in the bottom and the keel nearly demolished, and in danger of sinking or being crushed between the plaintiff's boats and the piles of a bridge, unless the plaintiff had saved it. The plaintiff secured the boat, attached a rope to it, towed it ashore, fastened it to a post, and after putting up notices in public

such service, and towards evening one of the officers of the defendant requested that plaintiff's boats be withdrawn. During the time that plaintiff's boats were present and assisting in putting out the fire, one or more officers of the defendant company were present. The court held that the fact that defendant's officers stood by and received this assistance without any warning to plaintiff that they declined it, and would not compensate him for it, carried with it no implication that defendant expected to compensate plaintiff, since the defendant being heavily insured, and the warehouse being full of goods belonging to others, there was no reason why defendant's officers should not have supposed that the boats had been sent by one of the other parties interested in the property.

[18] A portion of the opinion is omitted.

places in the nearest town and making other inquiries, and no owner appearing, took it to his own barn, stowed it there for two winters, and during the intervening summer made repairs (which were necessary to preserve the boat), and for its better preservation put it in the water, fastened to a wharf, and directed the wharfinger to deliver it to any one who should prove ownership and pay the plaintiff's expenses about it. The defendant afterwards claimed the boat; the plaintiff refused to deliver it unless the defendant paid him the expenses of taking care of it; and the defendant then took the boat by a writ of replevin, without paying the plaintiff anything. This action is brought to recover money paid by the plaintiff for moving and repairing the boat, and compensation for his own care and trouble in keeping and repairing the same, amounting to $26 in all.

The plaintiff testified, without objection, that the boat, when found by him, was worth five dollars. He was then asked by his counsel, what, when he found it, he considered it worth. This evidence was properly rejected as immaterial.

The plaintiff requested the chief justice of the superior court to rule that the boat was not lost goods, within the sense of Gen. St. c. 79. But the learned judge refused so to rule, and ruled that upon all the evidence the plaintiff could not maintain his action, and directed a verdict for the defendant. We are of opinion that this was erroneous. There is no statute of the commonwealth applicable to this case. * * *

The claim of the plaintiff is therefore to be regulated by the common law. It is not a claim for salvage [19] for saving the boat when adrift and in danger on tide water, and does not present the question whether the plaintiff had any lien upon the boat, or could recover for salvage services in an action at common law. His claim is for the reasonable expenses of keeping and repairing the boat after he had brought it to shore; and the single question is whether a promise is to be implied by law from the owner of a boat, upon taking it from a person who has found it adrift on tide water and brought it to shore, to pay him for the necessary expenses of preserving the boat while in his possession. We are of opinion that such a promise is to be implied. The plaintiff, as the finder of the boat, had the lawful possession of it, and the right to do what was necessary for its preservation. Whatever might have been the liability of the owner if he had chosen to let the finder retain the boat, by taking it from him he made himself liable

[19] SALVAGE.—The principle of salvage in admiralty law is a striking example of quasi contractual liability. Salvage has been defined as "the compensation that is to be made to other persons, by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss." Abbott on Shipping, c. III, § 1. While the salvor has a lien on the ship or goods saved for his services as well as for his expenses (Id. c. II), a finder of goods on land has at common law no lien for his expenses, nor for a reward for his services, unless a specific reward has been offered. Wood v. Pierson (1881) 45 Mich. 313, 7 N. W. 888.

to pay the reasonable expenses incurred in keeping and repairing it. Nicholson v. Chapman, 2 H. Bl. 254, 258, and note; Amory v. Flyn, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316; Tome v. Four Cribs of Lumber, Taney, 533, 547, Fed. Cas. No. 14,083; 3 Dane, Abr. 143; Story, Bailm. §§ 121a, 621a; 2 Kent, Comm. (6th Ed.) 356; 1 Domat, pt. 1, lib. 2, tit. 9, art. 2; Doct. & Stud. c. 51; Preston v. Neale, 12 Gray, 222.

Exceptions sustained.[20]

[20] See Nicholson v. Chapman (1793) 2 H. Bl. 254; Sheldon v. Sherman (1864) 42 Barb. (N. Y.) 368 (affirmed, 42 N. Y. 484, 1 Am. Rep. 569); Watts v. Ward (1854) 1 Or. 87, 62 Am. Dec. 299.

"The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor even, if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will. There is an exception to this proposition in the maritime law. I mention it because the word "salvage" has been used from time to time throughout the argument, and some analogy is sought to be established between salvage and the right claimed by the Respondents. With regard to salvage, general average, and contribution, the maritime law differs from the common law. That has been so from the time the Roman law downwards. The maritime law, for the purposes of public policy and for the advantage of trade, imposes in these cases a liability upon the thing saved, a liability which is a special consequence arising out of the character of mercantile enterprises, the nature of sea perils, and the fact that the thing saved was saved under great stress and exceptional circumstances. No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea. With regard to ordinary goods upon which labour or money is expended with a view of saving them or benefiting the owner, there can, as it seems to me according to the common law be only one principle upon which a claim for repayment can be based, and that is where you can find facts from which the law will imply a contract to repay or to give a lien. It is perfectly true that the inference of an understanding between the parties—which you may translate into other language by calling it an implied contract—is an inference which will unhesitatingly be drawn in cases where the circumstances plainly lead to the conclusion that the owner of the saved property knew that the other party was laying out his money in the expectation of being repaid. In other words, you must have circumstances from which the proper inference is that there was a request to perform the service." Per Bowen, L. J., in Falcke v. Scottish Imperial Insurance Company (1886) L. R. 34 Ch. D. 234, 248.

In Preston v. Neale (1858) 12 Gray (Mass.) 222, defendant quitted the premises which he had hired of the plaintiff leaving behind him several trunks and a stove. In an action to recover a charge for storage the court said: "In the present case which we hold to be in its legal incidents like deposits by finding or made by winds or floods, we think the plaintiff is entitled to recover for storage of the trunks and stove, from the time when they were left in her house, until the time when the defendant made a demand on her for them. But as she, having no lien on them, wrongfully withheld them from the defendant on his demand, she is not entitled to compensation for subsequent storage during such unlawful detention." See, also, Beckwith v. Frisbie (1860) 32 Vt. 559; Moline, Milburn & Stoddard v. Neville (1897) 52 Neb. 574, 72 N. W. 854.

MATHIE v. HANCOCK.

(Supreme Court of Vermont, 1906. 78 Vt. 414, 63 Atl. 143.)

General assumpsit. Heard on an agreed statement at the March term, 1905, Orleans county; Tyler, J., presiding. Judgment for the defendant. The plaintiff excepted.

ROWELL, C. J. This is general assumpsit. The facts, as agreed upon by the parties, are these: The defendant is administrator of the estate of one Niles, which is in process of settlement in the probate court. Before and at the time of his death Niles lived upon and carried on the town farm of the town of Hardwick, most of the cows on which belonged to the town. Immediately after Niles' death, the overseer of the poor, who was also superintendent of the farm, took possession of the farm and the cows. For some time before the death of Niles the plaintiff made his home with him on the farm, and was engaged in handling and breaking horses of his own and horses belonging to Niles and to others, and was so engaged at the time of Niles' death. When the overseer took possession of the farm, he told the plaintiff that the town would not care for the intestate's horses, nor furnish hay nor grain for them; and the plaintiff fed them on hay and grain and exercised them until they were taken possession of by the defendant as administrator, which, as we understand from the briefs, was as soon as he was appointed and qualified as such. A portion of the feed so used by the plaintiff belonged to Niles at the time of his death, and when that was gone the plaintiff furnished all the feed for the horses. The defendant denies all liability, and refuses to pay the plaintiff for said care and feed; but, if the plaintiff is entitled to recover therefor, it is agreed that he shall have judgment for $25 and costs.

It is not claimed that here is an express promise. Nor is there an implied promise in fact, for the defendant's assent does not appear, and that is essential to such a promise. If liability exists, therefore, it must be by virtue of a quasi promise—an implied promise in law, founded either on the doctrine that one shall not be allowed to enrich himself unjustly at the expense of another, or on the doctrine that when an obligation is imposed by law upon one to do an act because of an interest in the public to have it done, and that one fails to do it, he who does do it, expecting compensation, may recover therefor of him on whom the obligation is imposed. The latter is the ground on which the husband is liable at common law for the expenses of his wife's funeral (Jenkins v. Tucker, 1 H. Bl. 90); and, in some jurisdictions, executors and administrators, for the expenses of the decedent's funeral (Patterson v. Patterson, 59 N. Y. 574, 17 Am. Rep. 384). But in this state such expenses are debts against the estate, and, after paying the necessary expenses of administration, are preferred above all other debts. V. S. 2503. The former is the ground on which the

owner of lost goods is bound to pay the finder for the money he necessarily laid out and expended in and about the matter, if he takes the goods from the finder; but not otherwise, it would seem, for then he would not be benefited by the finder's outlay. Chase v. Corcoran, 106 Mass. 286; Keener, Quasi Cont. 357.

The plaintiff was in the service of the intestate at the time of his death only to the extent of handling and breaking horses for him. It does not appear that it was necessary for him to feed and exercise them after the testator's death in order to preserve them, for it does not appear that there was no one else to do it. True, the town refused; but for aught that appears those interested in the estate could have done it or procured it to be done. At all events, it does not appear that they could not. Nor can it be said that the horses were left in the defendant's possession, so that it cast any duty upon him to care for them on the ground of humanity or otherwise. Hence, for aught that appears, he was a mere volunteer in the matter; nor does it appear that he expected compensation, and that cannot be inferred, for no inference can be drawn by the court from agreed facts, because the agreement is the voluntary act of the parties, the same as is the creation of a board of arbitrators or of referees, from whose findings no inferences can be drawn, because they are a court of the parties' own creation. Kimball v. Estate of Baxter, 27 Vt. 628; Darby v. National Bank, 57 Vt. 370.

Nor was the defendant under any duty in respect of the horses during the time in question, for he was not administrator, and did not know, so far as appears, and had no interest to know, the condition of things, nor what the plaintiff was doing. If the defendant had paid the plaintiff, it would be for the probate court to say whether he should be allowed therefor in his administration account. The defendant, therefore, is not liable on the second ground above stated. Nor is he liable on the first ground, notwithstanding the estate may have been benefited; for the plaintiff was a volunteer, and that defeats him, however it might be if he were not. In Matter of Watson (Ex parte Phillips) 19 Q. B. D. 234, Watson, during a period in which there was no personal representative of the estate of a deceased testatrix and acting upon the instructions of one Eaton, a relation of the deceased, who had no authority in the premises, did work as a solicitor in respect of the administration and for the benefit of the estate. Subsequently the respondent, Phillips, obtained letters of administration de bonis non and refused to pay Watson; and it was held by the Court of Appeals, affirming the decision of the Queen's Bench Division, that he was not bound to pay, because the work was not performed under any contract with him. The court said that Watson was a mere volunteer as far as the administrator was concerned, and must look to Eaton for payment, and that there was certainly no rule of law nor principle of equity that obliges an administrator to

pay as administrator for work that he did not order and was not done for him. To the claim that as the work was beneficial to the estate, and Phillips as administrator had received that benefit, it would be unconscientious in him not to pay for it, the court said, if that was so, which it doubted, it would not make new law in order to compel people to do that which they are bound in conscience to do. In Luscomb v. Ballard, 5 Gray (Mass.) 403, 66 Am. Dec. 374, it was held that an executor cannot be charged in any capacity for services beneficial to the estate, rendered before his appointment and without his assent, under contracts with a special administrator and with an executor named in the will, but who declined the trust.

Judgment affirmed.

TODD v. MARTIN.

(Supreme Court of California, 1894. 4 Cal. Unrep. Cas. 805, 37 Pac. 872.)

Appeal from superior court, Trinity county; T. E. Jones, Judge.

Action by E. N. Todd against Isabell J. Martin, administratrix of the estate of John Martin, deceased, to recover for services as nurse to the deceased in his last illness, and for other services. Judgment for plaintiff, and defendant appeals.

HAYNES, C.[21] * * * 4. One item in plaintiff's claim is for seventeen days' services at the stable, from August 1st to the 17th, which was after the death of Mr. Martin. It is objected that these services were not shown to have been rendered "at the request of Mrs. Martin, as administratrix of the deceased." The facts were that, prior to his death, the deceased conducted a livery stable and plaintiff was employed therein for a year or more at a compensation of $50 per month. From the time of Martin's death until August 17th, there was no administrator or other person legally authorized to take charge of the estate, or to employ any one in any service connected therewith. It could not have been the duty of the plaintiff, in view of his past employment by Mr. Martin in that service, to have ceased to care for the property, or permit the horses to die of hunger or thirst. Services of this character so rendered prior to the appointment of an administrator must be deemed to have been included in the term of service contracted for by the deceased, and to form a proper charge against the estate; or, if it cannot be placed upon that ground, it is, while not a debt either of the intestate or the administrator, a charge thrown upon the assets by necessity, but for which the administratrix subsequently appointed would not be personally liable. It is analogous to a claim for funeral expenses paid by a person other than the administrator or executor, which, at common law, are a charge against the estate, though not strictly a debt due from the decedent. In Patterson v. Patterson, 59

[21] Portions of the opinion, dealing with other matters, are omitted.

N. Y. 574, 17 Am. Rep. 384, the defendant in an action upon an obligation made to the deceased, but payable to the executor, was permitted to set off the funeral expenses of the deceased paid by the defendant. In Hapgood v. Houghton, 10 Pick. (Mass.) 154, it was held that the law raises a promise on the part of the executor or administrator to pay for the funeral expenses as far as he has assets, and that if he have no assets he should plead that fact in bar, and that if he has, the judgment must be against them in his hands. Humanity, as well as the interests of the estate, required that the stock be cared for, and no one could more appropriately assume that duty than one who had been employed by the decedent in his lifetime to perform the same service; and as to the value of the services, that compensation which had been paid plaintiff by the decedent will be deemed reasonable; and as to services rendered after the death of Mr. Martin, plaintiff is a competent witness. * * *

Finding no error which requires a reversal we advise that the judgment be affirmed.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.[22]

[22] Compare In re Bryant's Estate (1897) 180 Pa. 192, 36 Atl. 738. See, also, Trustees v. Greenough (1881) 105 U. S. 527, 26 L. Ed. 1157.

In Great Northern Railway Co. v. Swaffield (1874) L. R. 9 Exch. 132, the defendant shipped his horse to himself at Sandy by plaintiff's line, and the horse arriving at night, and no one being on hand to receive it, plaintiff's agent put up the horse at a livery stable, as the railroad had no facilities for caring for the horse. The next day there was a dispute as to who should bear the liveryman's charges, the upshot of which was that the horse was left in the livery stable; the owner declining to take him unless reimbursed for his expenses and loss of time. Later the railroad paid the liveryman, delivered the horse to the owner, and brought suit against him for the liveryman's charges. The court held for the plaintiff, saying that since the defendant left the horse with the carriers, and refused to take it, the carriers "were bound from ordinary feelings of humanity to keep the horse safely and feed him: and that became necessary in consequence of the defendant's own conduct in refusing to receive the animal at the end of the journey according to his contract."

But see Earle v. Coburn (1881) 130 Mass. 596, where it was held that there was no liability on defendant to reimburse plaintiff for the expenses of keeping plaintiff's horse after an express disclaimer of responsibility by defendant; the court declaring that a promise to pay will never be implied against a defendant's protest, except in cases where the law imposes a duty, which duty must be a legal duty, not a mere moral one. "The common law deals with and enforces legal duties not moral; moral duties are defined and enforced in a different forum." Earle v. Coburn was followed in Keith v. De Bussigney (1901) 179 Mass. 255, 60 N. E. 614.

Similarly in Force v. Haines (1840) 17 N. J. Law, 385, plaintiff was not allowed to recover from defendant for support furnished the latter's slave after a disclaimer of responsibility by defendant; the court saying that plaintiff's duty under the circumstances was to notify the overseer of the poor.

NEGOTIORUM GESTIO IN THE CIVIL LAW.—"If one man has managed the business of another during the latter's absence, each can sue the other by the action on uncommissioned agency; the direct action being available to him whose business was managed, the contrary action to him who managed it. It is clear that these actions cannot properly be said to originate in a contract, for their peculiarity is that they lie only where one man has come forward and managed the business of another without having received any commission so to do, and that other is thereby laid under a legal obligation

SCEVA v. TRUE.

(Supreme Judicial Court of New Hampshire, 1873. 53 N. H. 627.)

This case is printed at page 27, supra.[23]

COTNAM v. WISDOM.

(Supreme Court of Arkansas, 1907. 83 Ark. 601, 104 S. W. 164, 12 L. R. A. [N. S.] 1090, 119 Am. St. Rep. 157, 13 Ann. Cas. 25.)

Appeal from Circuit Court, Pulaski County; R. J. Lea, Judge.

Action by F. L. Wisdom and another against T. T. Cotnam, administrator of A. M. Harrison, deceased, for services rendered by plaintiffs as surgeons to defendant's intestate. Judgment for plaintiffs. Defendant appeals.

Instructions 1 and 2, given at the instance of plaintiffs, are as follows: "(1) If you find from the evidence that plaintiffs rendered professional services as physicians and surgeons to the deceased, A. M. Harrison, in a sudden emergency following the deceased's injury in a street car wreck, in an endeavor to save his life, then you are instructed that plaintiffs are entitled to recover from the estate of the said A. M. Harrison such sum as you may find from the evidence is a reasonable compensation for the services rendered. (2) The character and importance of the operation, the responsibility resting upon the surgeon performing the operation, his experience and professional training, and the ability to pay of the person operated upon, are elements to be considered by you in determining what is a reasonable charge for the services performed by plaintiffs in the particular case."

HILL, C. J.[24] (after stating the facts). The reporter will state the

even though he knows nothing of what has taken place. The reason of this is the general convenience; otherwise people might be summoned away by some sudden event of pressing importance, and without commissioning any one to look after and manage their affairs, the result of which would be that during their absence those affairs would be entirely neglected: and of course no one would be likely to attend to them if he were to have no action for the recovery of any outlay he might have incurred in so doing. Conversely, as the uncommissioned agent, if his management is good, lays his principal under a legal obligation, so too he is himself answerable to the latter for an account of his management; and herein he must show that he has satisfied the highest standard of carefulness, for to have displayed such carefulness as he is wont to exercise in his own affairs is not enough, if only a more diligent person could have managed the business better." The Institutes of Justinian (A. D. 533) Book III, title XXVII, 1 (Moyle's Translation).

See also the Digest of Justinian, Book III, Title V. Similar provisions are found in the modern Continental Law. French Civil Code, §§ 1372–1375; German Civil Code, §§ 677–685.

[23] In Lyon v. Minor (1913) 174 Mich. 114, 140 N. W. 517, 45 L. R. A. (N. S.) 67, Ann. Cas. 1915A, 726, it was held that an attorney could recover compensation for services rendered to assist a person, committed to an institution as insane, to secure his release therefrom, as for necessaries, if they were faithfully and intelligently performed, although they may not have been successful.

See also note to the principal case, page 32, supra.

[24] The statement of facts is taken from the Southwestern Reporter.

issues and substance of the testimony and set out instructions 1 and 2 given at instance of appellee, and it will be seen therefrom that instruction 1 amounted to a peremptory instruction to find for the plaintiff in some amount.

The first question is as to the correctness of this instruction. As indicated therein the facts are that Mr. Harrison, appellant's intestate, was thrown from a street car, receiving serious injuries which rendered him unconscious, and while in that condition the appellees were notified of the accident and summoned to his assistance by some spectator, and performed a difficult operation in an effort to save his life, but they were unsuccessful, and he died without regaining consciousness. The appellant says: "Harrison was never conscious after his head struck the pavement. He did not and could not, expressly or impliedly, assent to the action of the appellees. He was without knowledge or will power. However merciful or benevolent may have been the intention of the appellees, a new rule of law, of contract by implication of law, will have to be established by this court in order to sustain the recovery." Appellant is right in saying that the recovery must be sustained by a contract by implication of law, but is not right in saying that it is a new rule of law, for such contracts are almost as old as the English system of jurisprudence. They are usually called "implied contracts." More properly they should be called "quasi contracts" or "constructive contracts." See 1 Page on Contracts, § 14; also 2 Page on Contracts, § 771.

The following excerpts from Sceva v. True, 53 N. H. 627, are peculiarly applicable here:[25] * * *

This subject is fully discussed in Beach on the Modern Law of Contracts, 639 et seq., and 2 Page on Contracts, 771 et seq. One phase in the law of implied contracts was considered in the case of Lewis v. Lewis, 75 Ark. 191, 87 S. W. 134. In its practical application it sustains recovery for physicians and nurses who render services for infants, insane persons, and drunkards. 2 Page on Contracts, §§ 867, 897, 906. And services rendered by physicians to persons unconscious or helpless by reason of injury or sickness are in the same situation as those rendered to persons incapable of contracting, such as the classes above described. Raoul v. Newman, 59 Ga. 408; Meyer v. K. of P., 178 N. Y. 63, 70 N. E. 111, 64 L. R. A. 839. The court was therefore right in giving the instruction in question.

2. The defendant sought to require the plaintiff to prove, in addition to the value of the services, the benefit, if any, derived by the deceased from the operation, and alleges error in the court refusing to so instruct the jury. The court was right in refusing to place this burden upon the physicians. The same question was considered in Ladd v. Witte, 116 Wis. 35, 92 N. W. 365, where the court said: "That is

[25] The court here quoted at length from Sceva v. True, page 27, supra.

not at all the test. So that a surgical operation be conceived and performed with due skill and care, the price to be paid therefor does not depend upon the result. The event so generally lies with the forces of nature that all intelligent men know and understand that the surgeon is not responsible therefor. In absence of express agreement, the surgeon, who brings to such a service due skill and care, earns the reasonable and customary price therefor, whether the outcome be beneficial to the patient or the reverse."

3. The court permitted to go to the jury the fact that Mr. Harrison was a bachelor, and that his estate would go to his collateral relatives, and also permitted proof to be made of the value of the estate, which amounted to about $18,500, including $10,000 from accident and life insurance policies. There is a conflict in the authorities as to whether it is proper to prove the value of the estate of a person for whom medical services were rendered, or the financial condition of the person receiving such services. In Robinson v. Campbell, 47 Iowa, 625, it was said: "There is no more reason why this charge should be enhanced on account of the ability of the defendants to pay than that the merchant should charge them more for a yard of cloth, or the druggist for filling a prescription, or a laborer for a day's work." On the other hand, see Haley's Succession, 50 La. Ann. 840, 24 South. 285, and Lange v. Kearney, 51 Hun, 640, 4 N. Y. Supp. 14, which was affirmed by the Court of Appeals, 127 N. Y. 676, 28 N. E. 255, holding that the financial condition of the patient may be considered. Whatever may be the true principle governing this matter in contracts, the court is of the opinion that the financial condition of a patient cannot be considered where there is no contract and recovery is sustained on a legal fiction which raises a contract in order to afford a remedy which the justice of the case requires. In Morrissett v. Wood, 123 Ala. 384, 26 South. 307, 82 Am. St. Rep. 127, the court said: "The trial court erred in admitting testimony as to the value of the patient's estate, against the objection of the defendant. The inquiry was as to the value of the professional services rendered by the plaintiff to the defendant's testator, and, as the case was presented below, the amount or value of the latter's estate could shed no legitimate light upon this issue nor aid in its elucidation. The cure or amelioration of disease is as important to a poor man as it is to a rich one, and, prima facie at least, the services rendered the one are of the same value as the same services rendered to the other. If there was a recognized usage obtaining in the premises here involved to graduate professional charges with reference to the financial condition of the person for whom such services are rendered, which had been so long established and so universally acted upon as to have ripened into a custom of such character that it might be considered that these services were rendered and accepted in contemplation of it, there is no hint of it in the evidence."

There was evidence in this case proving that it was customary

for physicians to graduate their charges by the ability of the patient to pay, and hence, in regard to that element, this case differs from the Alabama case. But the value of the Alabama decision is the reason given which may admit such evidence, viz., because the custom would render the financial condition of the patient a factor to be contemplated by both parties when the services were rendered and accepted. The same thought differently expressed is found in Lange v. Kearney, 51 Hun, 640, 4 N. Y. Supp. 14. This could not apply to a physician called in an emergency by some bystander to attend a stricken man whom he never saw or heard of before; and certainly the unconscious patient could not, in fact or in law, be held to have contemplated what charges the physician might properly bring against him. In order to admit such testimony, it must be assumed that the surgeon and patient each had in contemplation that the means of the patient would be one factor in determining the amount of the charge for the services rendered. While the law may admit such evidence as throwing light upon the contract and indicating what was really in contemplation when it was made, yet a different question is presented when there is no contract to be ascertained or construed, but a mere fiction of law creating a contract where none existed in order that there might be a remedy for a right. This fiction merely requires a reasonable compensation for the services rendered. The services are the same be the patient prince or pauper, and for them the surgeon is entitled to fair compensation for his time, service, and skill. It was therefore error to admit this evidence, and to instruct the jury in the second instruction that in determining what was a reasonable charge they could consider the "ability to pay of the person operated upon."

It was improper to let it go to the jury that Mr. Harrison was a bachelor and that his estate was left to nieces and nephews. This was relevant to no issue in the case, and its effect might well have been prejudicial. While this verdict is no higher than some of the evidence would justify, yet it is much higher than some of the other evidence would justify, and hence it is impossible to say that this was a harmless error.

Judgment is reversed, and cause remanded.[26]

BATTLE and WOOD, JJ., concur in sustaining the recovery, and in holding that it was error to permit the jury to consider the fact that his estate would go to collateral heirs; but they do not concur in holding that it was error to admit evidence of the value of the estate, and instructing that it might be considered in fixing the charge.

[26] Accord: Pray v. Stinson (1843) 21 Me. 402; Dunbar v. Williams (1813) 10 Johns. (N. Y.) 249, semble.

See, also, Raoul v. Newman (1877) 59 Ga. 408. Richardson v. Strong (1851) 35 N. C. 106, 55 Am. Dec. 430.

Contra: Bradner v. Krebbs (1894) 54 Ill. App. 652.

Compare Edson v. Hammond (1911) 142 App. Div. 693, 127 N. Y. Supp. 359

As to the rule in admiralty, see The Renpor (1883) 8 P. D. 115.

PIERPONT v. WILSON.

(Supreme Court of Errors of Connecticut, 1881. 49 Conn. 450.)

Assumpsit for goods sold, brought to the Court of Common Pleas, and tried before Harrison, J. Facts found and judgment rendered for the plaintiff for a less sum than he claimed. Motion in error by plaintiff. The case is fully stated in the opinion.

PARDEE, J. In October, 1878, the defendant abandoned his wife; she having neither necessary food nor means for procuring it, the plaintiff supplied her upon the credit of the defendant until March 28, 1879; his account is $104.93. In November, 1878, he sent to the defendant a statement of supplies theretofore furnished, amounting to $16.87; the latter then notified him that he should pay neither for past nor future supplies furnished without his written order. From the time of the abandonment the defendant was not asked by his wife to furnish supplies; he furnished none; and notified parties generally with whom he had been trading not to trust her except upon an order from himself, but gave her no order for supplies. The plaintiff claimed judgment for the full amount of his account; the Court of Common Pleas allowed him $16.87, and interest; he filed a motion in error.

Marriage imposes upon the husband an obligation to supply his wife with necessary food—an obligation from which he does not obtain release by abandoning her. The defendant by knowingly permitting his wife to be without necessary supplies, and without money or credit of her own wherewith to procure them, authorized her to purchase them from the plaintiff or any other person who, having knowledge of her necessities, should supply them. He could at any time put an end to the right of the plaintiff to supply her upon his credit by himself supplying her. But, while purposely withholding all credit and all supplies, he could not shut her up to want, either by following her and by private notices barring each successive door which might open to her appeal, or by inserting notices in the newspapers warning every person against supplying her. He must supply her if he desires to terminate the power to pledge his credit which his neglect has given her. And, having abandoned her with knowledge that she would presently be without necessary supplies and without money or credit of her own wherewith to obtain them, and having intentionally refrained from supplying her, she was under no obligation to seek him and ask his consent to her purchase from the plaintiff; nor was the latter, knowing her necessities, under any obligation to obtain his permission to supply them. Her necessary food is not to be made dependent upon her ability to find him. After abandonment the obligation remained upon him to take the initiative; to furnish food, known

to him to be necessary, without demand; and unless he furnished it, notices, special or general, avail him nothing.

There is error in the judgment complained of; it should be for the full amount of the plaintiff's claim.[27]

[27] Accord: Cromwell v. Benjamin (1863) 41 Barb. (N. Y.) 558; Baker v. Oughton (1906) 130 Iowa, 35, 106 N. W. 272; Mayhew v. Thayer (1857) 8 Gray (Mass.) 172.

In Cromwell v. Benjamin, supra, the court said: "The husband may be liable for necessaries furnished to the wife, in certain cases, though the existence of an agency or assent, express or implied in fact, is wholly disproved by the evidence, and this, upon the ground of an agency implied in law, though there can be none presumed in fact. It is a settled principle in the law of husband and wife, that by virtue of the marital relation, and in consequence of the obligations assumed by him upon marriage, the husband is legally bound for the supply of necessaries to the wife, so long as she does not violate her duty as wife; that is to say, so long as she is not guilty of adultery or elopement. The husband may discharge this obligation by supplying her with necessaries himself or by his agents, or giving her an adequate allowance in money, and then he is not liable to a tradesman who, without his authority, furnishes her with necessaries; but if he does not himself provide for her support, he is legally liable for necessaries furnished to her by tradesmen, even though against his orders."

In De Brauwere v. De Brauwere (1911) 203 N. Y. 460, 96 N. E. 722, 38 L. R. A. (N. S.) 508, a wife who had been deserted by her husband supported herself and her children by her own labor and sued her husband for the amount thus expended for support. The court upheld her right to recover, saying: "The husband was unquestionably under a legal obligation to provide his wife and children with the necessaries of life suitable to their condition. This liability would have been enforcible by the wife in her own behalf and in behalf of her infant children were it not for her disability at common law to sue her husband. This disability having been removed, a wife who has applied her separate estate to the purpose of an obligation resting primarily upon her husband may now recover from him the reasonable amounts which she has thus expended out of her separate estate in discharge of his obligation."

Liability of Parent for Necessaries Furnished His Infant Children.—"A parent is under a natural obligation to furnish necessaries for his infant children; and if the parent neglect that duty, any other person who supplies such necessaries is deemed to have conferred a benefit on the delinquent parent, for which the law raises an implied promise to pay on the part of the parent." Van Valkenburgh v. Watson (1816) 13 Johns. (N. Y.) 480, 7 Am. Dec. 395 (complaint dismissed, as not shown that father neglected his duty to furnish necessaries); Porter v. Powell (1890) 79 Iowa, 159, 44 N. W. 295, 7 L. R. A. 176, 18 Am. St. Rep. 353 (recovery for medical services furnished in an emergency to defendant's daughter, who though living away from home had not been fully emancipated); Rogers v. Rogers (two cases) (1914) 93 Kan. 108, 143 Pac. 408; Id., 93 Kan. 114, 143 Pac. 410, L. R. A. 1915A, 1137; (recovery for support of children by wife who had subsequently obtained a divorce); De Brauwere v. De Brauwere, supra.

Contra: Kelley v. Davis (1870) 49 N. H. 187, 6 Am. Rep. 499 (on ground that in the absence of statute the father owes no legal duty to support his minor children).

See Tiffany on Persons and Domestic Relations, § 116.

TRUSTEES OF CINCINNATI TOWNSHIP v. OGDEN.

(Supreme Court of Ohio, 1831. 5 Ohio, 23.)

This cause came before the court on a writ of error to the court of common pleas of Hamilton county. The case was this, as presented in a bill of exceptions:

The declaration was in assumpsit, and counted for "meat, drink, washing, and lodging, and other necessaries, found and provided by the plaintiff, at the special instance and request of the defendants, for one Martha Good, then and there being an inhabitant of Cincinnati township, and then and there being in a necessitous and suffering condition." Plea, non assumpsit.

The proof, on the trial, disclosed that about December 8, 1829, Ogden hired Martha Good to perform domestic labor in his family; that about the 15th of December, she was taken sick with the small-pox, of which she was confined to her bed, in Ogden's house, about two weeks, when she died. During this period she was provided for and nursed by Ogden's family, who, after death, provided her burial clothes; that she was apparently destitute of property, except some clothing; that she came from some other county of the state than Hamilton, and had no legal settlement in Cincinnati township; that when taken sick, Ogden applied to the trustees to take charge of her, who visited her and refused, but contributed one dollar as a gratuity, and proposed some other gratuitous aid, which Ogden refused to accept, unless upon an agreement to provide for her altogether; that there was no county poor-house in Hamilton county, and that Ogden was a man in narrow circumstances. Upon this proof the court of common pleas charged the jury that the plaintiff was entitled to recover, and a verdict was given for thirty dollars. The suit having been appealed from the judgment of the mayor, for fifteen dollars, by the trustees, judgment was rendered by the common pleas for the amount of the verdict and costs, to reverse which, this writ of error was brought.

HITCHCOCK, J.[28] The court are called upon in this case to give a construction to the "Act for the relief of the poor," passed February 10, 1816 (14 Ohio Laws, p. 197), and the act amendatory thereto, passed February 12, 1829 (27 Ohio Laws, p. 54).

We cannot expect to derive much assistance in the performance of this duty from the examination of English or American cases. The whole subject of supporting the poor, where it is done in pursuance of municipal law, depends upon statute regulation, and these statutes have been variant in different countries. It is owing to this variance that different decisions, upon the same question, are made in different states.

In this state, it has ever been the policy that each incorporated township should support all paupers within their respective limits. This

[28] Portions of the opinion are omitted.

does not seem to be controverted by the counsel for the plaintiff in error so far as it respects those who have obtained legal settlement; but it is denied that any duty is imposed to maintain those who are merely casual residents. The statutes in force at the time the liability of the plaintiff in error occurred, if there is any liability, are those of February 10, 1816, and February 29, 1829, and it is by these statutes the case must be governed. Section 1 of the act of 1816, enacts "that the overseers of the poor shall have the care and management of all paupers within the limits of their respective townships." Here is no restriction, no limitation. "All paupers," within the limits of the township, are to be under the care and management of the overseers of the poor. It may be proper here to remark, that the trustees of Cincinnati township are, by statute, authorized and required to discharge the duties of overseers of the poor.

Section 2 of the same statute enacts "that upon complaint being made to the overseers of the poor, that any inhabitant or inhabitants are in a suffering condition," etc. Every person residing in a township is an inhabitant, although such person may not have gained a legal settlement.

It would seem to the court, that a fair construction of these two sections of the statute would lead to the conclusion that the obligation was imposed upon the township to maintain or support, not only such paupers as have gained a legal settlement therein, but also such as were casual residents and who might need assistance. But, if there could be any doubt upon these two sections, that doubt must be removed upon the examination of the fifth. * * *

The next question to be examined is, whether an individual who has furnished necessaries to a pauper can maintain an action against the township. The solution of this question must depend upon the nature of the obligation which rests upon a township to support its poor. If it be merely in the nature of a moral obligation, then no action can be maintained unless there has been a previous request or an express promise on the part of the township. But if, on the other hand, it be an absolute legal obligation, then the law implies a promise and an action can be sustained. We are of the opinion that it is of this latter description. The supreme power of the state, by legislative enactment, has imposed the obligation. It is of as much binding force as the obligation of a parent to support his child or a husband his wife. We do not say that in every case, where an individual furnishes necessaries to a pauper, he can maintain an action against the township. Complaint must, in the first instance, be made to the overseers of the poor.[29] If these neglect their duty, or if the trustees of

[29] Usually one who has furnished such necessaries to a pauper without first notifying the public authorities is not allowed reimbursement from the county. Hamilton County v. Meyers (1888) 23 Neb. 718, 37 N. W. 623; and see Salsbury v. City of Philadelphia (1863) 44 Pa. 303. Unless it be a case of medical services rendered in an emergency. Lee County v. Gilbert (1893) 70 Miss. 791, 12 South. 593. Robbins v. Town of Homer (1905) 95 Minn. 201, 103 N. W.

the township refuse to make the necessary order, it is right and proper for an individual to furnish a distressed pauper with the necessary relief, and justice, sound policy, and law require that the individual performing this benevolent act should be remunerated.

On the part of the plaintiffs in error, it is urged that it is discretionary with the trustees to make or refuse an order for the support of a pauper; and that if these officers, in the exercise of that discretion, refuse, the township cannot be subjected to an action, although by possibility the officers, in their individual capacity might be liable for nonfeasance or misfeasance. It is true that a discretion is vested in the trustees, but it must be exercised in such a manner as to carry into effect the object of the law. They are the agents of the township. The township, not the individual trustees, is the responsible body, and the township cannot excuse itself by saying that its agents have been guilty of official misconduct.

It is further intimated that these officers should be proceeded against by mandamus; and such, in certain cases, seems to be the mode of proceeding in New York. But if the object was to compel the trustees to make the necessary order, this would be but a poor remedy, especially where the pauper was suffering under the ravages of a dangerous and loathsome disease. Before it could be applied the township would, in all probability, be relieved from expense by the death of the miserable being.

In the case before the court, it appears that Martha Good, the individual relieved, was residing in Cincinnati. She was taken sick in the house of Ogden with the small-pox. She was clearly a pauper, and needed assistance. Ogden complained to the trustees, and demanded of them to take the charge of her. This they refused. He was compelled either to let her suffer or perish in his own house, or to furnish the necessary aid. He pursued the latter course, and we can not doubt his right to receive a compensation.

The charge of the court of common pleas was to this effect, and is in accordance with our opinion of the law. The judgment of that court must be affirmed.[30]

1023. (In this and the preceding case the statute made an express provision for emergency service.) Board of Commissioners v. Denebrink (1907) 15 Wyo. 342, 89 Pac. 7, 9 L. R. A. (N. S.) 1234. Contra: Caswell v. Hazard (1873) 10 R. I. 490.

Compare French v. Benton (1862) 44 N. H. 28, and Gourley v. Allen (1825) 5 Cow. (N. Y.) 644, where a recovery was denied in accordance with the doctrine advanced in Houghton v. Town of Danville. See following note.

[30] Accord: Seagraves v. Alton (1851) 13 Ill. 366; Eckman v. Township of Brady (1890) 81 Mich. 70, 45 N. W. 502.

Contra: Houghton v. Town of Danville (1838) 10 Vt. 537; Patrick v. Town of Baldwin (1901) 109 Wis. 342, 85 N. W. 274, 53 L. R. A. 613.

In Houghton v. Town of Danville, supra, the court said: "These general expressions in the statute, declaring it the duty of towns to sustain their own and the transient poor, create no legal obligation. The result is, that the question of who are the proper subjects for relief, is always to be decided by the overseers only; that they alone are to decide who are to receive relief

FORSYTH v. GANSON.

(Supreme Court of New York, 1830. 5 Wend. 558, 21 Am. Dec. 241.)

This was an action of assumpsit, tried at the Livingston circuit in May, 1828, before the Hon. John Birdsall, then one of the circuit judges.

The action was brought for the support and maintenance of Esther Ganson, the mother of the plaintiff, and the step-mother of the intestate. It appeared when the father of the intestate married Esther Ganson, she was possessed of property to some considerable amount; in 1804, the father of the intestate bought a place and went into the business of tavern keeping; his sons, John the intestate and James the administrator, lived with him after they arrived of age and carried on business together. In 1811, a division was made of all the property between John and James, John receiving $1,000 more than his brother, and agreeing to support his father and step-mother, and accordingly did so until the death of his father, which happened about two years after the division of the property; after the death of his father, John refused to continue to support his step-mother, when her son, the plaintiff in this cause, took her to his house, and now brought his action against the administrators of John, to recover for her support and maintenance. On the trial of the cause, an admission of James, the administrator, made since the death of the intestate, proving the whole case, was received in evidence, though objected to, but the point was reserved. Independent of that admission, the case was established by other evidence. The defendant claimed a nonsuit, which was refused, and the judge charged the jury to inquire whether a sum of money or other funds had come to the hands of the intestate for the support of Esther Ganson; whether that fund had been expended; or whether, for a good consideration, the intestate had become liable for the support of Esther Ganson. If they found that no fund had been created, or that it had been expended, or that the intestate was not liable by contract for the support of Esther Ganson, then he directed them to find for the defendants, otherwise for the plaintiff. The jury found for the plaintiff for $297.50, subject to the opinion of this court whether the action could be maintained in the name of the present plaintiff. The verdict was now moved to be set aide.

and support, and they alone are to be the almoners of the public bounty or charity. And if this duty is wholly disregarded, no matter how pressing the necessity, or imperative the circumstances, others cannot do the duty, or afford the relief, and collect it of the town."

As to the right of one county to recover from another county compensation for the support of a pauper properly chargeable to the latter county, see Bristol v. New Britain (1898) 71 Conn. 201, 41 Atl. 548; Morristown v. Hardwick (1908) 81 Vt. 31, 69 Atl. 152. As to the statutory right of the county to collect the value of necessaries furnished an indigent relative of defendant, see McCook County v. Kammoss (1895) 7 S. D. 558, 64 N. W. 1123, 31 L. R. A. 461, 58 Am. St. Rep. 854; Tryon v. Dornfeld (1915) 130 Minn. 198, 153 N. W. 307, L. R. A. 1915E, 844.

SUTHERLAND, J.[31] If the plaintiff can recover at all, it must be on the ground that the intestate, John Ganson, was legally bound to support his step-mother, Esther Ganson, and that having refused to provide for her, the law implies a promise on his part to pay the plaintiff whatever he has necessarily expended in her support. There is no evidence, either of a request on the part of the intestate to the plaintiff to provide for Esther Ganson, or of any express promise to pay him for supporting her. The jury, by their verdict, have found that the intestate either had funds in his hands which he was bound to apply to the support of his step-mother, or that upon a good consideration he had promised to provide for her; and I think the verdict is warranted by the evidence in the case.

After the father had given up all his property to his sons John and James, and they had divided it between them, Timothy Beckus testifies that James, speaking of the division to John, said, "I consider that I have given you $1,000 the best of the bargain. I have had a family while you have had none, and I expect the old people will remain with you." James made no reply; but that he understood that he was to support his father and step-mother is shewn by the testimony of Edward Waterous, who states that after the division between John and James, he heard John say that the old people were to live with him. They accordingly did remain with him during his father's life, and the step-mother remained some time afterwards without any objection or complaint on the part of the intestate. John Hascal also testified that he heard the father say in John's presence that he had given up all his property to him, and that he was to maintain him and his wife; and the same witness further stated that he had heard a great deal of conversation in the Ganson family about their property, and that he understood from such conversation that John was to support the old people. This evidence warrants the conclusion that, in the division of the property of the father between the sons, the support of the parents was taken into consideration in the portion allotted to John, and that he undertook, in consideration of an extra allowance then made to him, to take care of and provide for the old people during their lives. * * *

The remaining inquiry is, (admitting the intestate to have been legally bound to support Mrs. Ganson,) whether this action can be maintained in the name of the present plaintiff. I am of opinion that it can. It appears to me to be analogous to the case of necessaries furnished to a wife or infant child for whom the husband or father improperly neglects or refuses to provide. In such cases the law raises an implied promise, on the part of the husband and father, to pay for such necessaries. Baker v. Barney, 8 Johns. 72, 5 Am. Dec. 326; Van Valkinburgh v. Watson, 13 Johns. 480, 7 Am. Dec. 395; Oatfield v. Waring, 14 Johns. 188; 1 Esp. 270; 2 Esp. 739; 3 Esp. 1; 1 H.

[31] A portion of the opinion is omitted.

Black. 90; 3 Bos. & Pul. 252; 5 Bos. & Pul. 148; Edwards v. Davis, 16 Johns. 281. In Mure v. Craig, 5 Bos. & Pul. 148, the husband had expressly covenanted with A., as trustee for his wife, to pay his wife a weekly allowance of five shillings; the wife lived with A., and the husband having neglected to pay the stipulated sum, A. brought an action of indebitatus assumpsit against him for board and other necessaries furnished to his wife, and the action was sustained, not withstanding the express covenant on which it was admitted the plaintiff might have sued.

The intestate in this case being legally bound to provide for Mrs. Ganson, the services and supplies afforded to her by the plaintiff were advantageous to the defendant, and may well be considered as having been rendered at his request.

New trial denied.[32]

ROGERS v. PRICE.

(Court of Exchequer, 1829. 3 Younge & J. 28.)

Assumpsit by the plaintiff against the defendant, executor of Davies, for work and labour as an undertaker and materials furnished for the funeral of Davies. Plea—Non assumpsit.

At the trial, which took place before Gaselee, J., at the Hereford Summer Assizes, 1828, it appeared that the testator died in Wales, at the house of his brother, who, thereupon, sent for the plaintiff, an undertaker residing at a distance. The plaintiff afterwards furnished the funeral, and the brother of the deceased attended it as chief mourner. It was admitted that the funeral was suitable to the degree of the deceased. Upon these facts, there being no evidence of any contract made by the defendant, or that he knew of the funeral until after it had taken place: the learned Judge was of opinion that the plaintiff was not entitled to recover, and directed a nonsuit, with leave to enter

[32] Contra: Moody v. Moody (1837) 14 Me. 307; Matheny v. Chester (1911) 141 Ky. 790, 133 S. W. 754. In Moody v. Moody, supra, the court said: "It may have been supposed, that there existed some analogy between this case, and that of a wife forced by the ill usage of the husband to leave his dwelling, and carrying with her a right to charge him with her support, by obtaining it from another person. There is no such analogy of legal rights. The case of the wife depends upon the peculiar relations of husband and wife. She is entitled by law to a support, and if unable to obtain it from the husband, she can maintain no suit against him to recover damages, or to obtain the means of compensating another for necessaries supplied. Considering that for many purposes husband and wife are to be regarded as one person, the law, under such circumstances, implies that her contracts are the contracts of the husband, for the purpose of affording her, in the only way in which it can be done, the necessaries of life at the charge of the person by law obliged to afford them. There is no such relation, nor any such necessity in this case; and the law will imply no such contract. The person entitled to support may, in his own name, enforce his rights, and obtain the means of fulfilling his own contracts with others."

a verdict for the plaintiff for 30*l.*, if this Court should think him entitled to recover.

A rule nisi was obtained.

GARROW, B.[33] It would, in my opinion, have been more satisfactory, if this case had been submitted to the consideration of a jury, to inquire upon whose credit the funeral was provided; but, that course not having been pursued, we must dispose of this rule in its present form. I am of opinion that the plaintiff is entitled to recover, and that therefore this rule must be made absolute. The simple question is, notwithstanding many ingenious views of the case have been presented, who is answerable for the expenses of the funeral of this gentleman. In my opinion, the executor is liable. Suppose a person to be killed by accident at a distance from his home; what, in such a case, ought to be done? The common principles of decency and humanity, the common impulses of our nature, would direct every one, as a preliminary step, to provide a decent funeral, at the expense of the estate; and to do that which is immediately necessary upon the subject, in order to avoid what, if not provided against, may become an inconvenience to the public. Is it necessary in that or any other case to wait until it can be ascertained whether the deceased has left a will, or appointed an executor; or, even if the executor be known, can it, where the distance is great, be necessary to have communication with that executor before any step is taken in the performance of those last offices which require immediate attention? It is admitted here that the funeral was suitable to the degree of the deceased, and upon this record it must be taken that the defendant is executor with assets sufficient to defray this demand; I therefore think that, if the case had gone to the jury, they would have found for the plaintiff, and that therefore this rule should be made absolute.[34]

[33] The concurring opinions of Hullock, B., and Vaughn, B., are omitted.

[34] In Patterson v. Patterson (1875) 59 N. Y. 574, 17 Am. Rep. 384, Folger, J., speaking for the court, said: "I have no doubt but that the reasonable and necessary expenses of the interment of the dead body of one deceased are a charge against his estate, though not strictly a debt due from him. The ground of this is the general right of every one to have decent burial after death; which implies the right to have his body carried, decently covered, from the place where it lies to a cemetery or other proper inclosure, and there put under ground. * * * And where the owner of some estate dies, the duty of the burial is upon the executor. Toller, Ex'rs, 245, bk. 3, c. 1, § 1. And our Revised Statutes (2 Rev. St. [1st Ed.] 71, pt. 2, c. 6, tit. 2, § 16, recognize this duty, in that the executor is prohibited from any interference with the estate until after probate, except that he may discharge the funeral expenses. From this duty springs a legal obligation, and from the obligation the law implies a promise to him who, in the absence or neglect of the executor, not officiously, but in the necessity of the case, directs a burial and incurs and pays such expense thereof as is reasonable. Tugwell v. Heyman, 3 Campb. 298. It is analogous to the duty and obligation of a father to furnish necessaries to a child, and of a husband to a wife, from which the law implies a promise to pay him who does what the father or the husband in that respect omits. * * * The decent burial of the dead is a matter in which the public have concern. It is against the public health if it do not take

JENKINS v. TUCKER.

(Court of Common Pleas, 1788. 1 H. Bl. 90.)

The defendant married the plaintiff's daughter; and some time after the marriage went to Jamaica, leaving her and an infant child in England. During his absence she died; and this action was brought by her father against the husband, to recover the money which he had expended after her death, in discharging debts which she had contracted while her husband was in Jamaica, (by living with her child in a manner suitable to her husband's fortune,) and in defraying the expences of her funeral, which were also proportioned to the husband's fortune and station. The declaration was in the usual form, for necessaries and funeral expenses, with the common money counts. The defendant paid £100 into court, and pleaded non assumpsit as to the residue.

At the trial, the evidence on the part of the plaintiff proved, that the defendant was possessed of a large estate in Jamaica; that he lived with his wife till he went thither; that he left her in bad health, and much in want of money; that after her death the plaintiff paid the debts which she had incurred in the absence of the defendant, and her funeral expences.

To this evidence the counsel for the defendant demurred.

LORD LOUGHBOROUH.[35] This demurrer to evidence strikes me as being extremely absurd, since by payment of money into court, the defendant admits a cause of action, (so that where money is paid into court, there can be no such thing as a nonsuit); and also, because it was for the jury to determine the quantum of damages. The court cannot anticipate the province of a jury, and ascertain damages on a writ of inquiry. It was not my intention, that any of the debts contracted by the defendant's wife, which the plaintiff discharged after her death, should have gone to the jury: but as the counsel for the defendant thought proper to demur to the evidence, the judgment on the demurrer must be general. They ought at the trial to have contended for a verdict; they seem to me to have taken the wrong method for their client.

place at all (Rex v. Stewart, supra), and against a proper public sentiment, that it should not take place with decency."

What expenditure may properly be incurred for a funeral "depends largely upon the custom of people of like rank and condition in society and the condition of the estate left by the deceased." O'Reilly v. Kelly (1900) 22 R. I. 151, 46 Atl. 681, 50 L. R. A. 483, 84 Am. St. Rep. 833; McCullough v. McCready (1907) 52 Misc. Rep. 542, 102 N. Y. Supp. 633 (an extreme case, recovery allowed for expenses of a wake).

Expenses which can be decently and reasonably postponed until the executor qualifies, or an administrator is appointed, should be so postponed, and one who before such appointment voluntarily incurs an expense for which there is no immediate necessity cannot compel the executor or administrator to reimburse him. Samuel v. Estate of Thomas (1881) 51 Wis. 549, 8 N. W. 361 (sister of deceased ordered and paid for a tombstone).

[35] The concurring opinions of Gould and Heath, JJ., are omitted.

I think there was a sufficient consideration to support this action for the funeral expences, though there was neither request nor assent on the part of the defendant, for the plaintiff acted in discharge of a duty which the defendant was under a strict legal necessity of himself performing, and which common decency required at his hands; the money therefore which the plaintiff paid on this account, was paid to the use of the defendant. A father also seems to be the proper person to interfere, in giving directions for his daughter's funeral, in the absence of her husband. There are many cases of this sort, where a person having paid money, which another was under a legal obligation to pay, though without his knowledge or request, may maintain an action to recover back the money so paid: such as in the instance of goods being distrained by the commissioners of the land-tax, if a neighbour should redeem the goods, and pay the tax for the owner, he might maintain an action for the money against the owner.

WILSON, J. If the plaintiff in this case had declared as having himself buried the deceased, the husband clearly would have been liable; and as the case stands at present, the plaintiff having defrayed the expences of the funeral, the husband is in justice equally liable to repay those expences, and in him the law will imply an assumpsit for that purpose.

Judgment for the plaintiff.[36]

CUNNINGHAM v. REARDON.

(Supreme Judicial Court of Massachusetts, 1868. 98 Mass. 538, 96 Am. Dec. 670.)

Contract on an account annexed for board and lodging furnished to the defendant's wife, and money paid for her funeral expenses.

In the superior court these facts were agreed: At the time of her death, in September, 1864, the defendant's wife had been lodged and boarded in the plaintiff's house ever since June, 1864, when she was brought there ill with consumption immediately after being compelled to leave the defendant by his cruelty. The defendant, though able to

[36] "Here, the mother of the deceased, and in the presence of Mr. Quin, the husband, assumed the entire control of the arrangements for the burial; sending for the undertaker, and directing him to spare no expense, as it was the last thing she could do for her daughter. This clearly showed an intention on her part to personally defray the charges. That the undertaker acted in pursuance of her request, is sufficiently apparent from the amount of the bill. It is equally clear that she was personally liable to him for it. As her daughter and the husband were living with her, and the death occurred under her roof, it was not unnatural that she should have had something to say in regard to the funeral arrangements, but she went much farther than to merely consult and advise; she, officiously and in the presence of the husband, assumed the whole direction, ignoring his rights and duties in the premises, and thus relieved both him and the estate of his wife from the obligation otherwise imposed upon them by law." Quin v. Hill (1886) 4 Dem. Sur. (N. Y.) 69.

provide for her support, refused to do so after she left him, and never visited her or solicited her to return. When she died, the plaintiff provided at reasonable expense burial for her remains, decent and suitable to the defendant's condition in life, but without giving notice to the defendant of her death, as he might easily have done.

It was not disputed that her separation from the defendant was justifiable; nor did he contest the items of the account for board and lodging; but, as to the items of money paid for funeral expenses, he contended that there was no promise implied by law that he should reimburse the plaintiff for his voluntary payment thereof. But Putnam, J., ordered judgment for the plaintiff for the full amount of his account; and the defendant appealed.

HOAR, J. The husband who by his cruelty compels his wife to leave him is considered by the law as giving her thereby a credit to procure necessaries on his account; and is responsible to any person who may furnish her with them. This responsibility extends not only to supplies furnished her while living, but to decent burial when dead. Its origin is not merely and strictly from the law making her his agent to procure the articles of which she stands in need. If it were so, the consequence would follow for which the defendant contends, that the agency would end with the life of the agent. But it is rather an authority to do for him what law and duty require him to do, and which he neglects or refuses to do for himself; and is applicable as well to supplies furnished to the wife when she is sick, insensible or insane, and to the care of her lifeless remains, as to contracts expressly made by her.

Nor is any notice to him requisite, in order to charge him for her funeral expenses, any more than for necessaries to sustain life. The burden is on the plaintiff in either case to prove the existence of the necessity, and that the husband has failed to make provision for it. But when this is established, nothing more is needed to create the liability; and it would seem to be an idle ceremony to give notice of his wife's death to a man who had refused her the means of sustaining life. The responsibility for funeral expenses is not a new and distinct cause of action, differing in kind, or in the rules by which it is created; but an incident to the obligation to furnish bodily support.

Judgment for the plaintiff for the full amount claimed.[37]

[37] In Bradshaw v. Beard (1862) 12 C. B. (N. S.) 344, 142 Eng. Rep. 1175, defendant's wife had left him after a quarrel and had gone to live with her brother, the plaintiff. On her death plaintiff paid the expenses of her funeral, without any understanding or intimation from defendant, who knew of her death, that he would not bury his wife. Held, that the defendant must reimburse plaintiff for the funeral expenses.

In Gleason v. Warner (1899) 78 Minn. 405, 81 N. W. 206, defendant's wife had left him and was suing him for a divorce, and when she died her relatives requested plaintiff, an undertaker, to embalm her body and furnish a suitable casket and place the same on a train for Natchez, her former home. The plaintiff brought action against defendant for the services so rendered. The court sustained a verdict for plaintiff, saying: "It is the right and the duty of the husband to bury his deceased wife in a suitable manner. His wishes in the premises must be respected, and no gratuitous intermeddling therewith

CONSTANTINIDES v. WALSH.

(Supreme Judicial Court of Massachusetts, 1888. 146 Mass. 281, 15 N. E. 631, 4 Am. St. Rep. 311.)

Contract, upon an account annexed, for the expenses of the funeral of the defendant's testatrix. Writ dated June 18, 1886. Trial in the Superior Court, before Blodgett, J., who allowed a bill of exceptions in substance as follows:

Louisa Constantinides, the plaintiff's wife and the defendant's testatrix, died on October 23, 1884, possessed of separate estate, all of which she gave to her son, the step-son of the plaintiff, by her will admitted to probate on November 17, 1884. The plaintiff had no knowledge of the will until three weeks after her death, before which time he had contracted, and on October 27, 1884, had paid a bill for her necessary funeral expenses, which it was agreed was reasonable. It was not contended that the defendant had, prior to or after his appointment, made any promise of payment.

The defendant asked the judge to rule that the plaintiff could not recover, and the judge so ruled, and ordered a verdict for the defendant; and the plaintiff alleged exceptions.

HOLMES, J. The funeral expenses of the testatrix were a preferred charge upon her estate. Pub. St. c. 135, § 3; Id. c. 137, § 1, St. 1882, c. 141. Under these statutes, and those establishing the independent position of married women with regard to their property, we think that, as between the estate of a married woman leaving property and her husband, the liability of the estate must be regarded as primary, and that it would be unreasonable to charge the husband for the funeral

by third parties will be encouraged. But, if the husband neglects to discharge the duty of burying his dead wife, he is liable to one who provides for her necessary and reasonable burial. Schouler, Dom. Rel. § 199. This liability is similar to the obligation of the husband to supply his wife with necessaries in life; for when dead the necessity for the speedy burial of her body is pressing and imperative, brooking no delay. Hence, if the husband is absent and cannot, or if present and will not, discharge this duty, the law implies a request on his part to do so to whoever reasonably performs the duty for him. It therefore follows that if the finding of the trial court to the effect that the defendant was seasonably notified of the death of his wife, and that he neglected to take any steps to prepare her body for burial, is sustained by the evidence, the defendant is liable to the plaintiff for the reasonable value of the casket and his services as an undertaker. * * * This is not, as claimed, a case where the reasonable wishes and efforts of the husband to give his dead wife a burial, becoming his and her station in life and his financial circumstances, have been thwarted by the officious intermeddling of his wife's relations, aided by the plaintiff. The plaintiff simply acted in good faith upon the request of the attorney and niece of the wife, in the absence of any action on the part of her husband. If defendant was seasonably notified of the death of his wife, it was his duty to take prompt action to secure the decent and reasonable burial of her remains. His attorney claims for him that he did not have such notice. This is the pivotal point in this case; for, unless he knew or ought to have known that his wife was dead, he cannot be charged with any neglect of duty in the premises." (The court, after reviewing the evidence, sustained the finding of the trial court that there was such notice.)

expenses, in all events, as necessaries, irrespective of any fault on his part. If, then, it was still, as formerly, the plaintiff's legal duty to see that his wife was buried, but her estate was primarily liable, he is entitled to recover his reasonable expenditures, as in other cases where a person has paid, in pursuance of a legal duty, what, as between himself and another, that other was bound to pay. There is no technical difficulty in a husband's imposing a liability upon his wife's executor after her death.

If it was not the plaintiff's legal duty to do what he did, nevertheless we are of opinion that he stood on no worse ground than a stranger would have done. A stranger could have recovered against the estate of a man, if he was justified in intermeddling. Sweeney v. Muldoon, 139 Mass. 304, 306, 31 N. E. 720, 52 Am. Rep. 708. And formerly, in the case of a married woman, he could have recovered against her husband. Lakin v. Ames, 10 Cush. 198, 221; Weld v. Walker, 130 Mass. 422, 423, 29 Am. Rep. 465; Bradshaw v. Beard, 12 C. B. (N. S.) 344. Undoubtedly he could now recover against her estate. If so, the husband can. In such a matter it is not to be presumed that the husband waives his legal rights, and makes a gift to the estate of his wife, in the absence of any expression or other evidence to that effect. Exceptions sustained.[38]

MANHATTAN FIRE ALARM CO. v. WEBER.

(Supreme Court of New York, Appellate Term, 1898. 22 Misc. Rep. 729, 50 N. Y. Supp. 42.)

Appeal from First District Court.

Action by the Manhattan Fire Alarm Company against Joseph Weber and Lewis Fields. From a judgment in favor of defendants, plaintiff appeals.

GIEGERICH, J.[39] On the 1st day of September, 1896, the defendants became the lessees of a certain music hall or theater in the city of New York, in which plaintiff had theretofore installed, for a former lessee, five fire-alarm boxes. These remained upon the premises until the 16th day of September, 1897, when they were removed by the plaintiff, who seeks to recover for having maintained such service during the period mentioned. The defendants contest the claim, on the ground that neither of them requested the service, and merely suffered the alarm signals to remain upon the premises pending plaintiff's attempt to secure from them a contract for their maintenance in the

[38] Accord: Skillman v. Wilson (1910) 146 Iowa, 601, 125 N. W. 343, 140 Am. St. Rep. 295 (two judges dissenting).
Contra: Smyley v. Reese (1875) 53 Ala. 89, 25 Am. Rep. 598; Stonesifer v. Shriver (1904) 100 Md. 24, 59 Atl. 139.

[39] A portion of the opinion, reviewing the evidence, is omitted.

future. Plaintiff, while conceding that the defendants did not expressly assent to, or promise to pay for, a continuation of the service, nevertheless bases its right to recover upon the theory that the facts and circumstances of the case bring it within the rule that where one voluntarily accepts and avails himself of valuable services, rendered for his benefit, when he has the option to accept or reject them, with knowledge that the party rendering the same expects payment therefor, a promise to pay may be inferred even without distinct proof that they were rendered at his request. Lawson, Cont. § 34; Benj. Cont. 18; 1 Pars. Cont. (8th Ed.) 486; Day v. Caton, 119 Mass. 513, 20 Am. Rep. 347; Davidson v. Gaslight Co., 99 N. Y. 559, 566, 2 N. E. 892. The difficulty with this position, however, is that the testimony upon which it is based was contradicted. * * *

It will be seen from the foregoing narration of the testimony that the main question presented for solution was one of fact. There was sufficient evidence in the case to support a finding either way. But it was the function of the trial justice to determine on which side the weight of the evidence inclined, or that the evidence did not preponderate in favor of the plaintiff; and, having found for the defendant upon a conflict of evidence, we should not disturb his conclusions. Weiss v. Strauss (Com. Pl.) 14 N. Y. Supp. 776; Lynes v. Hickey, 4 Misc. Rep. 522, 24 N. Y. Supp. 731. The plaintiff could at any time have discontinued the service by disconnecting the wires, and so rendering the apparatus worthless; but it did not see fit to do so, and merely because of such omission it cannot impose a liability on the defendants, in the absence of their request to maintain it.

Plaintiff further contends that the defendants were under a legal duty to maintain upon their premises an apparatus such as it had installed there, and we infer therefrom that the rule invoked is that where an obligation is imposed by law upon one to do an act, because of the interest which the public has in its performance, and he fails to perform it, another who performs it with the expectation of receiving compensation should be allowed to recover against the former. Keener, Quasi Cont. p. 341. The burden, however, is on the person making such a claim to establish the necessity for his intervention, as well as that the act done should have been performed by the person from whom recovery is sought. Id. p. 347.

In Keener on Quasi Contracts (page 349) the learned author says: "To charge a defendant for services rendered in the discharge of an obligation which he (the defendant) should have performed, the plaintiff must establish a necessity for his (the plaintiff's) action. In a case where the reason for the appeal to the plaintiff is the fact that the defendant has failed in his obligation, then no notice is necessary. If, however, the defendant has not refused to discharge his obligation, and his failure to act has been due to his want of opportunity, he must, if he is in a position to act, be given the opportunity before any one will be justified in acting in his stead."

The consolidation act, among other things, provided that: "The owners or proprietors of all * * * theaters and music halls * * * shall provide such means of communicating alarms of fire, accident, or danger to the police and fire departments, respectively, as the board of fire commissioners or the board of police commissioners may direct." Laws 1882, c. 410, § 454, as amended by Laws 1892, c. 703, § 1.

There was no direct proof that the public authorities ever adopted plaintiff's system, but it is fairly deducible from the letter of February 19, 1897, that it had been installed in some of the theaters in the city of New York by their consent. There is no pretense whatever that the plaintiff's system was the only one which had received official sanction during the period plaintiff claims to have maintained the service, and therefore the defendants were not confined in their choice to the service furnished by the plaintiff. Moreover, the record fails to disclose whether or not any other fire-alarm system was provided by the defendants during the period in question. But, aside from this, there was no necessity for the plaintiff to maintain its service upon the defendants' premises, as the public authorities had ample power to compel the defendants to discharge the duty which the law imposed (Laws 1882, c. 410, § 465, as amended by Laws 1892, c. 703, § 3); and hence, even though the evidence might have justified the inference that the plaintiff expected to be remunerated for maintaining the service, it cannot recover upon the ground that it, in the public's interest, discharged an obligation imposed by law upon the defendants (Keener, Quasi Cont. pp. 344, 347; Force v. Haines, 17 N. J. Law, 385).

For these reasons, to my mind, the judgment should be affirmed, with costs. All concur.

MACCLESFIELD CORPORATION v. GREAT CENTRAL RAILWAY.

(Court of Appeals. [1911] 2 K. B. 528.)

Appeal from the judgment of a Divisional Court (Phillimore and Horridge, JJ.) reversing a decision of the judge of the Macclesfield County Court.

Under the provisions of 7 Geo. IV, c. 30, a canal had been constructed by a canal company, which canal had, before the proceedings giving rise to the present action, vested in the defendants subject to the obligations imposed by that statute upon the original undertakers. In making the canal the undertakers cut through and across a public highway, and built a new bridge over the canal so constructed in order to carry the highway over it. In 1907 the plaintiffs, who were the highway authority, requested the defendants to repair the roadway on the bridge, but the defendants refused on the ground that, although they were liable to repair the fabric of the bridge, they were under no obligation, statutory or otherwise, to repair the roadway upon it. The roadway being dangerous if not repaired, the plaintiffs, as the highway

authority, executed the necessary repairs at a cost of 18s. 5d., and brought the present action to recover that amount. The county court judge gave judgment for the plaintiffs and gave leave to appeal. The Divisional Court held that the statute imposed on the defendants no liability to repair the roadway over the bridge and reversed the decision of the county court judge. The plaintiffs appealed.

KENNEDY, L. J.[40] I have come to the same conclusion, both on the reasoning on which this case must be decided and on the authorities which have been so fully dealt with by my learned brethren; I need add but a few words in expressing my concurrence.

Upon the question of construction, I think that the true view is that contended for by the plaintiffs.[41] * * *

Assuming the question of construction to be decided in favour of the plaintiffs, the difficulty which I, in common with the other members of the Court, feel to be insuperable is the difficulty of finding legal grounds upon which, having done work which they were not bound to do, the local authority can recover. If it could have been shewn that the plaintiffs were legally compellable to do the work, I should say that, having been compelled to do something which the railway company ought to have done the plaintiffs might recover;* but the authorities, as Farwell, L. J., has pointed out, are clear to shew that it would be a sufficient defence in a case of this kind, were proceedings taken against the local authority for non-repair of the roadway passing over the bridge, to shew that Parliament by this private Act in a section which, so far as regards the portion with which we are concerned, has to be construed for the public benefit, not for the benefit merely of an individual or a set of private individuals, has ordered that the repair is to be done by the company. In such a case it could have been pleaded as a defence to proceedings against the local authority that the burden had been thrown upon another body, and therefore the common law liability had been, as it were, extinguished by the will of Parliament. Not being under a statutory obligation to pay for or to do the work, this local authority has done the work and incurred expense in doing it, and I do not know the legal principle upon which in those circumstances they can throw the burden upon some one else who ought in the first instance to have done the work, and who therefore is in a position to say "You who seek to recover this payment from me have acted as volunteers." In those circumstances it appears to me that on one of the grounds taken by the Divisional Court, whilst I should not assent to the main reason upon which the judgment proceeded, their decision was sound, and therefore we must dismiss this appeal.

Appeal dismissed.[42]

[40] The concurring opinions of Vaughan Williams and Farwell, L. JJ., as well as a portion of the opinion of Kennedy, L. J., are omitted.

[41] The plaintiffs' contention was that statute imposed on defendants the duty to keep the entire bridge in repair.

*See Inhabitants of Berlin v. School Society, page 489, infra.

[42] See 25 Harvard Law Review, 77.

MUMFORD v. BROWN.

(Supreme Court of New York, 1826. 6 Cow. 475, 16 Am. Dec. 440.)

On error from the Seneca C. P. Brown sued Mumford before a justice, for money paid and work done, in repairing certain premises of which the parties were tenants in common. The former recovered; and the latter appealed to the C. P. where the former also recovered; on this state of facts, presented upon bill of exceptions: the parties being tenants in common of a lot, the plaintiff below made a board fence on the rear, where an old fence had rotted down. The new fence was a substantial benefit; and the lot would produce as much additional rent, as would pay for the repairs. When the plaintiff made the repairs, he was in actual possession of the lot, under a lease for one year from the defendant, of his half, at a stipulated rent. The defendant lived about 3 miles distance from the premises; and was often in the village where they lay. No express request for, assent to, or promise to pay for the repairs on the part of the defendant was proved; nor did it appear that, before making the repairs, the plaintiff had requested the defendant to make his share of them. The plaintiff claimed to recover one half the value of the repairs. The defendant moved the C. P. for a nonsuit, which they denied. Verdict and judgment for the plaintiff below.

SAVAGE, C. J. Clearly, the defendant below was not liable as landlord. It is not in the power of a tenant to make repairs at the expense of his landlord, unless there be a special agreement between them, authorizing him to do this. The tenant takes the premises for better and for worse; and cannot involve his landlord in expense for repairs, without his consent.

It is, however, a different question, whether the defendant below was not liable as tenant in common, for such repairs as were necessary to preserve the property.

The ancient mode of proceeding, by one tenant in common against his co-tenant, who refused to repair, was by writ, de reparatione facienda, a remedy which, probably, still exists.[43] A recovery could be had by this writ only in case of refusal to repair; and admitting that the action of assumpsit has superseded the ancient proceeding, should not the plaintiff below have shewn a request and refusal? In Doane v. Badger, 12 Mass. 65, it was decided that one claiming a privilege in a well and pump, situate in the land of another, each being bound to contribute to the repairs, can have no action for repairs against him whose land the well is in, until after a request and refusal to repair. Jackson, J., who delivered the unanimous opinion of the court, said,

[43] "We are not aware of any instance in which the writ has been employed in the United States and its use in the mother country was rare." Note to Ward v. Ward (1895) 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449, in 52 Am. St. Rep. 911, 934.

that considering the parties as tenants in common, with no prescription, or special contract as to repairs, it was clear the action could not be sustained, without a request by the plaintiff to the defendant to join in making the repairs. He says the action on the case seems to be a substitute for the old writ de reparatione facienda. But he adds: "If two co-tenants tacitly agree, or permit the house or its appurtenances to go to decay, neither can complain of the other, until after a request and refusal to join in making the repairs." The reason upon which he founds this position, seems to be conclusive. It is, that, till such request and refusal, both tenants are in equal fault, one having as much reason to complain as the other.

In Loring v. Bacon, 4 Mass. 575, it appeared that the plaintiff owned the upper, and the defendant the lower story of a house. The plaintiff repaired the roof, after requesting the defendant to join in the repairs; and then sued to recover the defendant's alleged proportion. The court held that the plaintiff could not recover. The parties were considered, not as tenants in common; but owners in severalty of the parts occupied by each. But the principle was recognized, that tenants in common may be compelled to repair by the writ de reparatione facienda; and also that if one suffer his separate property to go to decay to the injury of another, a writ may be obtained to compel him to repair it; and that after an injury sustained, an action on the case lies. That case was very different from this; and no inference can be drawn from it, affecting the question now before the court.

I know of no adjudication or principle by which one shall be compelled to pay another for services rendered without request or assent, express or implied.

The plaintiff in error is not liable on the count for money paid, because it was without his assent; nor is he liable as co-tenant, because he was not in fault, having never been requested to make the repairs. That the repairs were proper and necessary, does not alter the case.

The judgment must be reversed. Judgment reversed.[44]

[44] Accord: Ward v. Ward (1895) 40 W. Va. 611, 21 S. E. 746, 29 L. R. A. 449, 52 Am. St. Rep. 911 (with excellent note collecting the authorities); Cooper v. Brown (1909) 143 Iowa, 482, 122 N. W. 144, 136 Am. St. Rep. 768.

Contra: Fowler v. Fowler (1882) 50 Conn. 256.

In Kentucky relief is allowed in equity. Alexander v. Ellison (1880) 79 Ky. 148.

In Calvert v. Aldrich (1868) 99 Mass. 74, 96 Am. Dec. 693, and Merchants' Bank of Florence v. Foster (1899) 124 Ala. 696, 27 South. 513, a recovery for necessary repairs was denied, even though that had been a prior demand and refusal.

When a tenant in common is called on to account for rents and profits, or to submit to a partition of the premises, he is allowed compensation for necessary repairs, and under some circumstances for improvements. See Ford v. Knapp (1886) 102 N. Y. 135, 6 N. E. 283, 55 Am. Rep. 782; Ward v. Ward, supra.

CHAPTER V

BENEFITS CONFERRED UNDER COMPULSION

SECTION 1.—DISCHARGE OF DEFENDANT'S OBLIGATION

I. In General

EXALL v. PARTRIDGE et al

(Court of King's Bench, 1799. 8 Term R. 308.)

This was an action, upon promises for money paid, laid out and expended, for the use of the defendants. At the trial before Lord Kenyon, at the sittings after last term, it appeared in evidence, that the three defendants were lessees of certain premises by deed from one Welch, to whom they thereby covenanted to pay the rent; and that two of the defendants afterwards, with the plaintiff's knowledge, assigned their interest to Partridge, the other co-lessee, who was a coach-maker; subsequent to which assignment, the plaintiff put his carriage upon the premises, under the care of Partridge, where it was taken as a distress by Welch, the landlord, for rent in arrear; and the plaintiff, in order to redeem it, was obliged to pay the rent due, taking at the time a receipt from Welch's attorney, as for so much received on account of the three defendants. The present action was brought to recover that sum.

The plaintiff was nonsuited on the ground that the action should have been brought against Partridge alone, he being the person in the sole possession of the premises at the time, with the knowledge of the plaintiff, who had trusted him only with the possession of his property; and he also being the person ultimately responsible to the other two defendants; and, therefore, it was said that the money must be taken to have been paid for his use only. The plaintiff obtained a rule nisi.

Lord Kenyon, Ch. J. Some propositions have been stated, on the part of the plaintiff, to which I cannot assent. It has been said, that where one person is benefited by the payment of money by another, the law raises an assumpsit against the former; but that I deny: if that were so, and I owed a sum of money to a friend, and an enemy chose to pay that debt, the latter might convert himself into my debtor, nolens volens. Another proposition was, that the assignment from two of the defendants to the third, was not evidence against the plaintiff, because he was no party to it; that also I deny: it surely was evidence to shew in what relation the parties stood to this estate. I admit that where one person is surety for another, and compellable to pay the

whole debt, and he is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered in an action against him for money paid, even though the surety did not pay the debt by the desire of the principal: but none of those points affect the present question. As the plaintiff put his goods on the premises, knowing the interests of the defendants, and thereby placed himself in a situation where he was liable to pay this money, without the concurrence of two of the defendants, I thought at the trial that it was money paid to the use of the other defendant only; but on that point I have since doubted; and I rather think that the opinion I gave at the trial was not well founded.

GROSE, J. The question is, whether the payment made by the plaintiff, under these circumstances, were such an one from which the law will imply a promise by the three defendants to repay? I think it was. All the three defendants were originally liable to the landlord for the rent: there was an express covenant by all, from which neither of them was released. One of the defendants only being in the occupation of these premises, the plaintiff put his goods there, which the landlord distrained for rent, as he had a right to do; then for the purpose of getting back his goods, he paid the rent to the landlord, which all the three defendants were bound to pay. The plaintiff could not have relieved himself from the distress without paying the rent: it was not therefore a voluntary, but a compulsory payment. Under these circumstances, the law implies a promise by the three defendants to repay the plaintiff; and, on this short ground, I am of opinion that the action may be maintained.

LAWRENCE, J. One of the propositions stated by the plaintiff's counsel certainly cannot be supported, that whoever is benefited by a payment made by another, is liable to an action of assumpsit by that other; for one person cannot, by a voluntary payment, raise an assumpsit against another: but here was a distress for rent, due from the three defendants; the notice of distress expressed the rent to be due from them all; the money was paid by the plaintiff in satisfaction of a demand on all, and it was paid by compulsion; therefore I am of opinion that this action may be maintained against the three defendants. The justice of the case indeed is that the one who must ultimately pay this money should alone be answerable here: but as all the three defendants were liable to the landlord for the rent in the first instance, and as by this payment made by the plaintiff, all the three were released from the demand of the rent, I think that this action may be supported against all of them.

LE BLANC, J. Not having been in Court when this motion was first made, I have not formed on the sudden a decisive opinion upon this case. But, at present, the inclination of my opinion is, that this action may be maintained against the three defendants, on this ground:—The three defendants were all by their covenant bound to see that the rent was paid; by their default in not seeing that it was paid, the plaintiff's goods were distrained for a debt, due from the three defendants to

Welch; by compulsion of law he was obliged to pay that debt; and, therefore, I think he has his remedy against the three persons who by law were bound to pay, and who did not pay this money.

Rule absolute.[1]

HOGG v. LONGSTRETH.

(Supreme Court of Pennsylvania, 1881. 97 Pa. 255.)

Error to the Court of Common Pleas, No. 3, of Philadelphia County.

This was an action of assumpsit by William Hogg, Jr., against John Longstreth, to recover the amount of certain taxes paid by the plaintiff on premises of which the plaintiff was mortgagee and the defendant was terre-tenant. The court directed a verdict for the defendant, upon which judgment was entered.

TRUNKEY, J.[2] Henry Myers gave to the plaintiff three mortgages, dated May 31, 1872, each being on a separate lot in Philadelphia. Subsequently Myers conveyed the lots to Kaign, Kaign conveyed to Taylor, and Taylor, by deed dated February 6, 1874, conveyed to Longstreth, the defendant; each conveyance being subject to said mortgages. In 1879, a scire facias was issued on each mortgage, against Myers with notice to Longstreth, as terre-tenant, and the judgments thereon aggregated nearly $6,000. Hogg, the mortgagee, purchased the lots at sheriff's sale on his judgments. During the five years that Longstreth owned the lots, he neglected to pay the taxes. Judgment had been obtained for the taxes of the first three years. After his purchase at sheriff's sale, the mortgagee paid that judgment, and also the taxes for the remaining two years, the proceeds of sale having been insufficient to cover them, and he claims to recover the amount of said judgment and taxes in this suit.

There is no evidence that the defendant agreed to pay the mortgage-debt. Hence he was not personally liable therefor, and was under no obligation to the plaintiff arising out of a contract. As against all the world, except the mortgagee, he held the lots by absolute title, and he could divest the mortgagee's estate by paying the debt. The mortgagee was liable to be taxed for money at interest secured by the mortgages;

[1] In Edmunds v. Wallingford (1885) L. R. 14 Q. B. D. 811, certain goods, belonging to plaintiff's assignors and in defendant's possession, were seized and sold in satisfaction of defendant's debt. Held, plaintiff could recover the value of such goods in an action of money had and received. This decision discredits England v. Marsden (1866) L. R. C. P. 529, which had limited somewhat the doctrine of Exall v. Partridge, supra.

In Wells v. Porter (1831) 7 Wend. (N. Y.) 119, plaintiff bailed certain hogs, for the purpose of being fatted, with one of the defendants, who were lessees of land. The hogs were seized and sold on a distress for rent of the premises, and plaintiff bought them in at the sale. Held, plaintiff could recover from defendants the money thus paid.

See, also, In re Button, [1907] 2 K. B. 180.

[2] The statement of facts is abridged.

the defendant, holding title under the mortgagor, was liable for the taxes on the land.

Being in possession, he was not only legally liable, but had no equity for the attempt to impose payment of the taxes on another person. By force of law the taxes were a personal charge against the defendant, as well as a lien on the real estate. This lien was not only entitled to preference over other liens, but would not be discharged by a judicial sale on any other lien, unless the proceeds were sufficient to pay it. Therefore, the plaintiff had no alternative but to pay the taxes owing by the defendant, or lose the land. Had the taxes been prosecuted to collection before the foreclosure of the mortgage, the plaintiff must have paid them, or have lost his security. A mortgagee in possession, holding a living pledge, may pay taxes on the land, and treat the sum so paid as part of his debt, which he is entitled to receive out of the profits. When the mortgagor is in possession, and neglects to pay taxes which are a lien on the land, the mortgagee may pay them not only in reliance on the personal liability of the owner, but in reliance that the land is liable, and the lien will be deemed as transferred by the State to him in favor of the mortgage-debt. Kortright v. Cady, 23 Barb. (N. Y.) 490. Where a mortgagee is under the necessity of satisfying an execution on a prior judgment, to preserve his security, he is held by right of substitution to stand in the place of the judgment creditor, and on sale of the land is entitled to receive the amount of the judgment out of the fund as well as the mortgage debt. The payment of the judgment is an act which the mortgagee was compelled to do for his own safety. Silver Lake Bank v. North, 4 Johns. Ch. (N. Y.) 370. The principle of subrogation in such case, for purposes of lien and distribution, is familiar, and it often applies where there can be no recovery in a personal action.

It is a clearly established principle, that no assumpsit will be raised by the mere voluntary payment of the debt of another person; from such act a request and promise are not implied. Another principle is, that when the plaintiff is compelled to pay the defendant's debt, in consequence of his omission so to do, the law infers that he requested the plaintiff to make the payment for him. As when the plaintiff at the request of the defendant left a carriage on the defendant's premises, and the carriage was distrained for rent, it was held that the plaintiff, having paid the rent, could recover it. In such case and the like, it is not permitted to the defendant to defend on the ground that the payment was voluntary. In some cases when a plaintiff has voluntarily performed a duty which the defendant was under a strict legal liability to perform, he may recover the money expended, although there has been no express consent or request by the defendant to the plaintiff's act. As when a man, in the absence of the husband, incurs expense in burying the deceased wife in a manner suitable to the husband's condition.

There was a strict legal liability on the defendant to pay the taxes. And it was his duty. Prompt payment of taxes is to the public advantage. Attempts by him who owes and ought to pay them to evade payment, or shift the burden upon another, ought not to be encouraged. The defendant has shown nothing which in good conscience should relieve him. He wittingly became owner and held possession of the lots subject to the mortgages, and had as little right to create or suffer an encumbrance which would take preference of the mortgage as the mortgagor would have had, had he remained owner and in possession. The mortgagee was compelled to pay the taxes in relief of the land purchased for his debt, the land not raising a fund sufficient to pay both liens. We are of opinion this is a clear case for application of the principle, that he who is compelled to pay another's debt, because of his omission to do so, may recover on the ground that the law infers that the debtor requested such payment.

The plaintiff's first point should have been affirmed. Judgment reversed, and a venire facias de novo awarded.[3]

[3] The principal case represents the prevailing doctrine. Phinney v. Foster (1905) 189 Mass. 182, 75 N. E. 103; Iron City Tool Works v. Long (Pa. 1886) 7 Atl. 82 (immaterial that legal proceedings to collect the tax have not yet been commenced; not necessary that plaintiffs wait until process was issued against them or their property); Childress v. Vance (1872) 60 Tenn. (1 Baxt.) 406.

Contra: William Ede Co. v. Heywood (1908) 153 Cal. 615, 96 Pac. 81, 22 L. R. A. (N. S.) 562 (strong dissenting opinion).

For a few of the many further applications of the doctrine see:

Dawson v. Linton (1822) 5 B. & Ald. 521. (By statute a drainage tax was payable by certain tenants who might deduct and retain the same out of their rents due to their landlords. Held that an outgoing tenant, who had paid his rent in full, but whose goods left on the premises had been distrained for such tax and who was obliged to pay it, might recover the amount thereof from his landlord.)

Hales v. Freeman (1819) 1 Brod. & B. 391. (By statute a legacy duty was chargeable upon the executor, who on making payment might deduct the same from the amount due the legatee, and was also chargeable upon the legatee when he shall have received his legacy without such duty having been paid. The amount of the legacy was paid in full to the legatee and thereafter the executor paid the duty and sued the legatee. Held for plaintiff; Dallas, C. J., saying: "This does not resemble the case of a voluntary payment, or a payment made in ignorance of fact or law. So far from being a voluntary payment, it is clearly compulsory on the clause of the statute holding both executor and legatee liable at any time. Both parties, therefore, being liable in this case, the payment made by the plaintiff was in substance a payment for the legatee, and the plaintiff is entitled to recover.")

Sargent v. Currier (1870) 49 N. H. 310, 6 Am. Rep. 524. (Purchaser of chattel recovers from seller the amount of mortgage paid off by purchaser, both parties being ignorant of the existence of the mortgage at the time of the sale.)

Goodridge v. Lord (1813) 10 Mass. 483. (Owner of vessel paid wages due from defendant, a master employed by the charterer of the vessel, to release the vessel from a libel for such wages.)

Treat & Young v. Craig (1901) 135 Cal. 91, 67 Pac. 7. (Purchaser of land subject to mortgage, required by judgment on foreclosure to pay deficiency judgment, upon paying same recovers amount from mortgagor.)

Irvine v. Angus (1899) 93 Fed. 629, 35 C. C. A. 501. (Bona fide claimant of stock, who, pending litigation as to ownership, paid assessment to prevent

INHABITANTS OF TOWN OF BERLIN v. SCHOOL SOCIETY OF NEW BRITAIN.

(Supreme Court of Errors of Connecticut, 1832. 9 Conn. 175.)

This was a bill in chancery, to which the defendants gave a general demurrer; in which the plaintiffs joined; and thereupon the case was reserved for the consideration and advice of this Court.

HOSMER, C. J.[4] Two general questions arise in this case, to wit, whether there is adequate remedy for the plaintiffs at law; and if not, whether they are entitled to the redress sought in chancery.

1. The facts averred in the plaintiffs' bill, if there be any remedy, unquestionably show, that there is adequate redress at law. The plaintiffs, by the general law of the state, (Stat. 1821, p. 266,) are obliged to make, build, and keep in sufficient repair, all the necessary highways within the limits of their town. From this, to a certain extent, they

sale of the stock, allowed to recover same from the one finally adjudged to be the owner of the stock.)

Hoadley v. Dumois (1895) 11 Misc. Rep. 52, 31 N. Y. Supp. 853. (Consignee paying money due owners of the ship from the charterer on account of hire of the ship, for which the owners have a lien on the cargo, may recover same from the charterer.)

Poe v. Dixon (1899) 60 Ohio St. 124, 54 N. E. 86, 71 Am. St. Rep. 713. (Grantor of land, who is personally liable upon a mortgage on such land and who is required to pay a deficiency judgment, may recover from grantee, who had assumed such mortgage.)

But see Manning v. Poling (1901) 114 Iowa, 20, 83 N. W. 895, 86 N. W. 30.

To entitle plaintiff to maintain his action it is not essential that he should have paid money. It is sufficient if there has been a payment made by him in satisfaction of the defendant's liability, either by way of a conveyance of land (Ainslie v. Wilson [1827] 7 Cow. [N. Y.] 688, 17 Am. Dec. 532; Lord v. Staples [1851] 23 N. H. 451, 457), or by way of a set-off in reduction of his own claim against the creditor (Ticonic Bank v. Smiley [1847] 27 Me. 225, 46 Am. Dec. 593).

In Volker v. Fisk (1909) 75 N. J. Eq. 497, 72 Atl. 1011, plaintiff employed defendant to sell certain land. Defendant sold the land for $6,000 to one Fornarotto, who at plaintiff's request paid defendant $300 out of the purchase price as commission for selling the land. Fornarotto subsequently repudiated the sale on the ground of his infancy and obtained a decree for rescission against the plaintiff, pursuant to which decree plaintiff paid him $6,000. Plaintiff now brings a bill in equity against the defendant for the return of such commission, plaintiff relying upon the theory of subrogation. Held for defendant, the court saying: "It is clear to me that the complainant has a perfect cause for action in a court of law against Mrs. Fisk to recover the money in the equitable action of assumpsit for money paid, upon an implied contract. Mr. Chitty says the count for money paid is supported if the payment were made at the express or implied request of the defendant, and that it is clear that if money be paid by a person in consequence of a legal liability to which he is subject, but from which a third person ought to have relieved him by paying the amount, a request will be implied. 1 Ch. Pl. 351. Surely the complainant was under a legal liability to pay Fornarotto the $300, and that liability was cast upon him by the decree of this court. Just as surely Mrs. Fisk ought to have relieved him from the burden by paying the amount herself. Ergo, the law implies that the complainant has made the payment at the request of Mrs. Fisk, and therefore he can recover the amount from her in assumpsit."

[4] The statement of facts and a portion of the opinion are omitted.

aver, that they were exonerated, by the defendants, who, on a consideration, received by them, expressly assumed to build the necessary highways, within the society of New-Britain. On application to them, for this purpose, the defendants refused to discharge this legal obligation, by reason of which the plaintiffs, as they were bound to do, by the law, built certain highways, and paid and expended large sums of money for this purpose. These sums they now seek to recover, by their bill. In these allegations are comprised all the elements of the action of assumpsit for money paid, laid out and expended.

The only seeming objection arises from the necessity of sustaining the averment, that the money was advanced at the special instance and request of the defendants. But this request the law implies, from the facts stated in the case. The defendant's assent is always implied, where the plaintiff is under a legal obligation to pay money, through his default. Such are the cases of sureties, who satisfy a debt; of a person, who pays money on a bond or judgment, for the use of a joint obligor; of one who, in consequence of the defendant's default, has been compelled to pay money to relieve his goods from distress; and generally, where from the beneficial nature of the consideration and circumstances of the case, a request may be implied. 1 Fonbl. Eq. 336, n.; Yelv. 41, n. (Metcalf's Ed.); Jenkins v. Tucker, 1 H. Bla. 93; Oatfield v. Waring, 14 Johns. (N. Y.) 188; 2 Stark. Ev. 100, 1, 2.

If there was a discovery required in the case, or the nature of the relief was specific, the plaintiffs' bill might be sustained; but neither of these exist. An account from the defendants is not requisite, being a matter of defence only; and the recovery sought is for a sum of money, to be collected, in the usual manner, by execution. Coe v. Turner, 5 Conn. 86; Kempshall v. Stone, 5 Johns. Ch. (N. Y.) 193.

2. If, however, the remedy were in chancery, the plaintiffs must fail. * * *

For the reasons assigned, the superior court must be advised, that the plaintiffs' bill be adjudged insufficient. See Sterling v. Peet, 14 Conn. 249.

Demurrer to be sustained and bill dismissed.[5]

[5] In Spencer v. Parry (1835) 3 A. & E. 331, a tenant as a part of his rent agreed to pay the taxes on the property which by statute were due from the landlord. The tenant having made default, the landlord paid the taxes and sued for money paid to defendant's use. Held, that plaintiff had misconceived his remedy, since his payment "relieved the defendant from no liability but what arose from the contract between them."

BROWN v. HODGSON.

(Court of Common Pleas, 1811. 4 Taunt. 189.)

Payne sent butter to London consigned to Pen, by the hands of the plaintiff, a carrier, who, by mistake delivered it to the defendant, and he appropriated it to his own use, selling it and receiving the money. Pen had paid Payne for the butter, and Brown, admitting the mistake he had made, paid Pen the value. The plaintiff declared for goods sold and delivered, and for money paid; and delivered to the defendant a bill of particulars, "To 17 firkins of butter, £55 6s." not saying for goods sold. It was objected for the defendant; that there was no contract of sale, either express or arising by implication of law between the parties, upon this transaction, and that although the plaintiff might have recovered in trover, he could not bring assumpsit for goods sold; the count for money paid was not adverted to at the trial. The jury found a verdict for the plaintiff.

Vaughan, Sergt., in this term, obtained a rule nisi to set aside the verdict; and

Shepherd, Sergt., now showed cause against it, contending that inasmuch as Pen might have recovered the value of the butter against the defendant, it was competent to the plaintiff, who had paid to Pen the value of the butter, to sue the defendant for the price, as money paid for his use.

Vaughan, contra, contended that the plaintiff was precluded from taking that ground, because he had made no claim for money paid in his bill of particulars, but only for goods sold.

MANSFIELD, C. J. At the trial my attention was not called to the count for money paid, but upon this count I think the action may be sustained. The plaintiffs pay Pen on account of these goods being wrongfully detained by Hodgson; they pay the value to the person to whom both they and Pen were bound to pay it; and this, therefore, is not the case of a man officiously and without reason paying money for another; and, therefore, the action may be supported. As to the objection taken respecting the bill of particulars, bills of particulars are not to be construed with all the strictness of declarations; this bill of particulars has no reference to any counts, and it sufficiently expresses to the defendant, that the plaintiff's claim arises on account of the butter.

HEATH, J. We must not drive parties to special pleaders to draw their bills of particulars.

Rule discharged.[6]

[6] In Van Santen v. Standard Oil Company (1880) 81 N. Y. 171, the plaintiff's complaint alleged in substance that the defendant, at the request of one Sohns, loaded a vessel with petroleum, and by representations that it had put on board 110 barrels more than it had in fact the defendant induced the master of the vessel to give to Sohns a bill of lading for that amount in excess of the actual amount loaded, and Sohns paid the defendant therefor; that Sohns assigned the bill of lading, and the assignees on arrival com-

NIMICK v. HOLMES.

(Supreme Court of Pennsylvania, 1855. 25 Pa. 366, 64 Am. Dec. 710.)

Error to the District Court of Allegheny County.

This was an action of assumpsit brought by William Holmes & Co. against Charles A. Israel and others, owners of the steamboat "Susquehanna," for the loss of ninety-six hogsheads of sugar, shipped by Holmes & Co., upon the said steamboat, from Cincinnati to Pittsburgh, upon a bill of lading, excepting the unavoidable dangers of the river and fire.

While the boat was lying at the wharf in Cincinnati, on the 4th May, 1852, taking in a cargo for Pittsburgh, which consisted principally of sugar, cotton, bacon and oil, she was discovered to be on fire in the hold. The cause of the fire was unknown. The hatches were closed down, and preparations made for getting up steam and injecting it into the hold, by means of apparatus provided for that purpose, and also water was introduced by means of hose. In about an hour after the discovery of the fire, the steampipes were brought into play, and turned into the interior of the boat, where they continued to operate for fourteen hours or more. The fire, however, still making progress, and the officers of the boat believing there was no other possible means of saving the boat and cargo, determined, after consultation among themselves, and with various other persons, upon the expedient of scuttling her. They accordingly ran the boat out into the river, about two miles from the wharf, and there sunk her on a bar. A portion of the deck was torn up, and water introduced from above, and by these means the fire was subdued and extinguished. In a few hours afterwards, the boat was raised and taken back, with the remnant of the cargo, to Cincinnati, where the cargo was sold. The cargo was injured to about seventy-five per cent. of its value, and the boat and cargo, together, to the value of about twenty-five per cent. of their entire value.

The declaration contained four counts. The first count was on the bill of lading against the defendants as common carriers; the second, a special count for contribution on a general average; the third, a general count for general average; and the fourth, for money had and received.

pelled the master to pay for the deficiency. Plaintiff claimed as assignee of the master to recover the amount so paid. Held, that a demurrer to the complaint was properly overruled; the court saying: "It was the duty of the defendant to place on board the vessel the full number of barrels for which it received pay; it represented to the master of the vessel that it had done so. In consequence of this representation he undertook to deliver that number to the consignee, who paid therefor upon faith in the bill of lading. The neglect of duty by the defendant imposed upon the master the obligation to make good the deficiency caused by this neglect, not voluntarily, but in performance of a legal duty, enjoined by the conditions of the bill of lading. Those conditions resulted from the act of the defendant and are equivalent to an express request by the defendant to make such payment."

See, also, Bailey v. Bishop (1910) 152 N. C. 383, 67 S. E. 968.

The plaintiffs, on the trial, gave in evidence the bill of lading, and proved the value and non-delivery of the sugar, and rested. The defendants then introduced the proof of the special facts and circumstances above stated. The evidence given in the case showed that both boat and cargo were in imminent peril, and that the introduction of steam and water into the hold, the scuttling of the boat, and the tearing up of the deck were resorted to, for the purpose of preventing the entire destruction of the boat and cargo, and were necessary to accomplish that end.

The general instructions of the Court below (Hampton, P. J.) were summed up as follows:

"If, then, you believe from the evidence there was a common danger both to the boat and cargo, which was imminent and apparently inevitable, except by voluntarily causing the loss and injury that were done to the vessel and a portion of the cargo in order to save the remainder, and that by these means so employed, the vessel and a portion of the cargo were saved, then the plaintiffs will be entitled to your verdict on the footing of a general average."

The jury found for the plaintiffs $5,076.61—$4,073.40, part thereof, on the second count for general average, and $1,003.21, the residue thereof, on the last count for money had and received—and for the defendants on the other counts.

LOWRIE, J.[7] Though the Rhodian law de jactu provided for contribution only in the case of goods cast overboard in times of peril, yet the spirit of the regulation is in its reason, which is, because the act was done for the benefit of all; and it was this reason, rather than the limited expression of it, that was applied in the Roman jurisprudence. Dig. 14, 2. And if the adoption of the Rhodian law by Augustus and Antonine is the only evidence that the Romans derived their law of marine contribution from the Rhodians, then it is fully met by the text (Dig. 14, 2, 2, 3), which refers, for the same principle to the Roman lawyers, Servius, Labea, and Ofilius, who flourished in the time of Julius Cæsar; and the absence of all reference to the Rhodian law, in the cases mentioned in the Digest, seems to show that the regulation was part rather of their common than of their statute law. And, while it may be doubted, perhaps, whether our law of average was in fact derived from the Romans, it is very plain that the Roman law on this subject has had great influence in moulding and defining that of all modern commercial nations. The equity of the rule is so obvious to natural reason, that it may very well be supposed that the practice might grow up spontaneously, wherever naval commerce existed. The name average, given to it in nearly all European languages, would seem to strengthen this supposition, for this is not at all of Roman origin; and a modern latin word, "avaria," had to be invented to express it, as the word "contributio" did not express the same idea. Average means

[7] The statement of facts has been abridged.

ship damage, and not contribution, as is plain when we speak of particular average. The average of common parlance is a secondary sense of the word, derived from the practice of contribution in cases of general average.

But whencesoever the practice may have been derived into the law of modern nations it may be said that, for America, England, and continental Europe, there is but one law on this subject; and its unity is preserved by the simplicity of the principle embodied in it, and by the fact that all treatises, European and American, on this subject, like those on international law, are regarded as the common property of the commercial world.

In the Ordinatio Nautica of the Hanseatic Cities, title 8, which was compiled in 1614 from more ancient customs and ordinances, there is a law on this subject, which is scarcely more comprehensive than the Rhodian law de jactu; but Reinold Kuricke, in his commentary upon it, shows that its practical interpretation has been as large as the reason upon which it is founded, and he quotes from Weitsius the rule, that every loss, suffered by ship or cargo for the purpose of averting a common danger, is a subject of general average.

Locconius (De Jure Maritimo, 2, 8, 7) says that equity and expediency require this extensive interpretation, and that it is easy to apply the rule according to its reason to all cases of sacrifice for the common safety as they arise.

The rule is laid down in all its breadth by the commentators on the Digest, 14, 2. Pothier merely repeats what he finds there; but Voet generalizes the cases, and declares that no matter where the act is done, or under what circumstances of danger, if there be a sacrifice of part for the safety of the rest, and without any fault of the master, it is a case of general average. Noodt says that, whatsoever may be the nature of the sacrifice, it is at the common expense, if it is for the common safety. In pari causa, par jus servature, etiam cum verba legis deficiunt. Huber says the same.

Mittermaier (Grundsätze des Deutschen Privatrechts, § 317) says, to general average belongs every intentional sacrifice made for the purpose of averting or mitigating a danger that is common to both ship and cargo; and he cites very freely the English and American works on this subject, that are familiar to us all.

Vincens (3 Legislation Commerciale, 186) declares that all the damages deliberately suffered for the common safety, and all the time expended in repairing them, must be taken as general average. To this rule there are no exceptions.

It is unnecessary to repeat the quotations of our own authorities, made by the counsel, for they all declare and illustrate the same principle. In all European and American treatises, we find the same sorts of instances given, and they all tend to enforce the broad rule of general average already expressed in various forms. Thus the following instances of sacrifice have been declared cases of general average:

Goods cast overboard; masts, rigging, anchors, and boats cut away; the hire of lighters, and the goods lost thereby; the hire of armed convoy; the damage incurred in order to evade a hostile pursuit; damage from an engagement with pirates, including the rewards to the crew, the healing of the wounded, and the burial of the dead; the sinking of a vessel in a crowded port, in order to prevent the fire of an adjoining one from spreading to the others; the cutting of the cable of one in order to save others; the voluntary stranding of the ship; ransom from pirates; compromise with captors; seeking port and refitting after an inevitable accident; and the excess of damage or expense borne by one of several ships, sailing in company, in defending against a common enemy.

In some countries a consultation is required before the sacrifice is made; but that form is resorted to only as a means of deciding upon and proving its necessity, and is not a part of our law, for it may be otherwise proved. An analysis of the cases very plainly reveals three things as the elements of general average: a purpose, a means, and a result; a design to avert a common danger by a sacrifice voluntarily made, and a successful issue. The first and the last are perfectly definite in their character, while the means must always remain to be defined by the rule of prudence when the danger arises.

Guided by the light of the rule and its instances, we feel constrained to say that when a vessel or its cargo takes fire without the fault of the crew, the damage done by the application of water or steam in extinguishing the fire, and by tearing up part of the vessel in order to get at it, is general average. The danger is a common one, and the cost of the remedy must be common. It makes no difference how the water is applied; by the aid of fire-engines on the land, or in the form of steam, or by scuttling the vessel. All these modes were tried in this case before the success was complete. They are all to be treated together, because they all referred to the same peril. They were the means employed for the purpose of averting the danger in which they were placed. It was a sacrifice for the common safety, for it was intentionally injuring or destroying all that part of the cargo that could be thus affected by water, in order to save the rest. The result was successful if a single article was saved by the means employed. Without attempting to follow the counsel in their minute criticism upon the charge to the jury, we may say that it was entirely correct.

There is an exception to the admission of evidence, but it also is unfounded. Judgment affirmed.[8]

[8] See also Berkley v. Presgrave (1801) 1 East, 220; The John Perkins (1857) 13 Fed. Cas. No. 7,360.

"The rule of contribution in cases of jettison has its origin in the maritime law of Rhodes, of which the text, as preserved by Paulus (Dig. L. 14, tit. 2), is: 'Si levandæ navis gratis jactus mercium factus est, omnium contributione sarciatur, quod pro omnibus datum est.' The principle of the rule has been the frequent subject of judicial comment. Lord Bramwell, in Wright v. Marwood, 7 Q. B. D. 67, said that, to judge from the way in which contribution is claimed in England, 'it would seem to arise from an implied contract inter se

II. Indemnity and Contribution

(A) Between Co-Obligors

DECKER v. POPE.

(At Nisi Prius before Lord Mansfield, C. J., 1757. 1 Selw. N. P. [13th Ed.] 91.)

This was an action brought by an administrator de bonis non of a surety, who, at defendant's request, had joined with another friend of defendant's in giving a bond for the payment of the price of some goods that were sold to defendant: and the surety having been obliged to pay the money, the administrator declared against the defendant for so much money paid to his use.

Lord Mansfield directed the jury to find for the plaintiff; observing, that where a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use. He added, that he had conferred with most of the judges upon it, and they agreed in that opinion.[9]

to contribute by those interested.' The present Master of the Rolls, in Burton v. English, 12 Q. B. D. 220, disputed that view, and stated his opinion to be that the right to contribution 'does not arise from any contract at all, but from the old Rhodian laws, and has been incorporated into the law of England as the law of the ocean. It is not as a matter of contract, but in consequence of a common danger, when natural justice requires that all should contribute to indemnify for the loss of property which is sacrificed by one, in order that the whole adventure may be saved.' Whether the rule ought to be regarded as matter of implied contract, or as a canon of positive law resting upon the dictates of natural justice, is a question which their Lordships do not consider it necessary to determine." Per Lord Watson in Strang, Steel & Co. v. A. Scott & Co. (1889) 14 A. C. 601, 607.

"There has been much discussion in the books as to whether the right to a general average contribution rests upon natural justice, or upon implied contract, or upon a rule of the maritime law, known to and binding upon all owners of ships and cargoes. But the difference has been rather as to forms of expression, than as to substantial principles or legal results." Per Gray, J., in Ralli v. Troop (1895) 157 U. S. 386, 394, 15 Sup. Ct. 657, 39 L. Ed. 742.

For a full discussion of the law of general average, see Abbott on Shipping, c. VIII; Carver on Carriage by Sea, c. XII.

[9] In Hunt v. Amidon (1842) 4 Hill (N. Y.) 345, 40 Am. Dec. 283, Walworth, Ch., said: "It is an equitable principle of very general application, that where one person is in the situation of a mere surety for another, whether he became so by actual contract or by operation of law, if he is compelled to pay the debt which the other in equity and justice ought to have paid, he is entitled to relief against the other, who was in fact the principal debtor. And when courts of law, a long time since, fell in love with a part of the jurisdiction of the court of chancery, and substituted the equitable remedy of an action of assumpsit upon the common money counts, for the more dilatory and expensive proceeding by a bill in equity in certain cases, they permitted the person thus standing in the situation of surety, who had been compelled to pay money for the principal debtor, to recover it back again from the person who ought to have paid it, in this equitable action of assumpsit as for money paid, laid out and expended for his use and benefit."

For other cases on the surety's right of indemnity, see Ames' Cases on Suretyship, 499 et seq.; Hening's Cases on Suretyship, 218 et seq.

CITY TRUST, SAFE DEPOSIT & SURETY CO. v. AMERICAN BREWING CO.

(Court of Appeals of New York, 1903. 174 N. Y. 486, 67 N. E. 62.)

Appeal from an order of the Appellate Division of the Supreme Court in the fourth judicial department, sustaining plaintiff's exceptions, ordered to be heard in the first instance by the Appellate Division, and granting a motion for a new trial.

PARKER, C. J. Upon this review the complaint must be accepted as true, and from it it appears that plaintiff became surety on a bond executed by John M. Kurtz to the people of the state of New York in the sum of $1,000, the condition being that if a liquor tax certificate should be granted to Kurtz he would not permit any gambling upon the licensed premises, etc. The certificate was issued to Kurtz, and subsequently a judgment was entered against Kurtz and this plaintiff, as principal and surety on the bond, for a breach of the condition, in that Kurtz had maintained on the licensed premises a nickel-in-the-slot machine, which was there used for gambling purposes.

Before the trial in that action this plaintiff discovered that defendant herein was the real owner of such liquor tax certificate and of the nickel-in-the-slot machine, and it demanded that defendant assume the defense of the action, which it refused. After satisfying said judgment, plaintiff brought this action, alleging in the complaint, in substance, in addition to the facts already stated, that defendant was the real owner of the certificate and the proprietor of the business, employing Kurtz, paying his compensation, furnishing the articles sold, bearing all losses, and pocketing the profits, when there were any; that Kurtz was but the representative and servant of the defendant when he applied for the certificate and when he applied to plaintiff to become surety; that plaintiff supposed he was the principal—having therefore an incentive to obey the law—whereas defendant controlled the business and premises, and maintained therein a nickel-in-the-slot machine, operated by its direction and for its profit.

Defendant, therefore, had the benefit of plaintiff's suretyship—for without some surety a certificate could not have been issued—and to its conduct, solely, it was due that plaintiff was compelled to pay the penalty of the bond, for it maintained the gambling device which constituted a breach of the condition of the bond; and the inquiry is, can plaintiff recover from defendant the loss which the latter has cost it? Plaintiff could recover of Kurtz, and probably would, were he responsible; but why may he not recover from the party which, while benefiting by the suretyship, committed the injury?—from the hidden principal that by a wrongful act, prohibited by the conditions of the bond and forbidden by statute, caused a loss to this plaintiff?

Ever since Justinian said, "The maxims of law are these: To live

honestly, to hurt no man, and to give every one his due," it has been a leading object of jurisprudence to compel wrongdoers to make reparation. Now, it is a general rule of law that a person commits a tort, and renders himself liable for damages, who does some act forbidden by law, if that act causes another substantial loss beyond that suffered by the rest of the public; and that rule covers this case.

Defendant, through its agent, Kurtz, induced plaintiff to become a surety on the bond for Kurtz, and then, in violation of the statute, it conducted a nickel-in-the-slot machine on the premises, by means of which misconduct the surety was compelled to pay the penal sum of the bond. In other words, defendant committed an act forbidden by law, and the direct effect of its act was to cause plaintiff a substantial loss beyond that suffered by the rest of the public; and for the damage thus sustained it should respond to plaintiff.

The order should be affirmed, and judgment absolute ordered for plaintiff on the stipulation, with costs. Order affirmed, etc.

NORTON v. COONS.

(Supreme Court of New York, 1846. 3 Denio, 130.)

Assumpsit tried before Parker, C. J., at the Rensselaer circuit, in April, 1844. The plaintiffs sued for contribution, as co-sureties with the defendant, in the following promissory note:

"$1,000. One year after date we jointly and severally promise to pay to the order of Olive Eldridge one thousand dollars, for value received. Troy, March 31st, 1841, with interest.

"Schuyler & Akin.
"B. & A. Norton.
"Joseph H. Coons."

Schuyler & Akin were principal debtors. They applied to Miss Eldridge for the loan of $1,000, and offered to give the plaintiffs as sureties; but she did not know them, and required that the defendant's name should also be furnished. S. & A. drew and signed the note, and the plaintiffs signed it as sureties. The plaintiffs did not then know that the defendant was to sign; nor had the defendant agreed to do so. Two days afterwards, Schuyler & Akin saw the defendant and asked him to sign the note, and told him that Miss Eldridge required his name. The defendant did not like to sign the note, as it was drawn jointly and severally. S. & A. told him he would run no risk at all, as the plaintiffs were abundantly responsible; and that he would not be liable so long as they were responsible. The defendant said it was something he would not do for every body; but as he had dealt a good deal with S. & A., and if he run no risk, he would do it. S. & A. told him his name was wanted to satisfy Miss Eldridge that the note was good; and upon these considerations, as the witness expressed it, the

defendant put his name to the note. S. & A. failed within a few months; and the plaintiffs were afterwards compelled to, and did pay and take up the note. After S. & A. failed, the defendant said he was on the note with other men, and expected to lose one half of it, unless S. & A. would secure him as they had promised to do.

The judge charged the jury, among other things, that if it was the understanding of the plaintiffs when they signed the note that they were to be, or if they intended to be the sole sureties of Schuyler & Akin, and did not know that the defendant was to sign the note, and the defendant subsequently signed without the knowledge of the plaintiffs, under an agreement with Schuyler & Akin that he was only to be responsible in case the plaintiffs were unable to pay, and signed to satisfy Miss Eldridge, then the defendant was not such a co-surety as would make him liable to contribution to the plaintiffs; and in such case that it was not necessary to show an express agreement made between the plaintiffs and the defendant, as to their relative liability on the note. The jury found a verdict for the defendant; and the plaintiffs move for a new trial on a bill of exceptions.

BRONSON, C. J.[10] The doctrine of contribution among sureties is founded on a general principle of equity and justice. Sureties are in æquali jure, and must bear the burden equally. Contribution may be enforced whether they were bound jointly or severally; by the same, or by different instruments; and although the party who sues did not know at the time he became a surety, that the defendant was also a surety. The order of time in which they became bound is not a material inquiry. The only question is, whether they were in fact sureties for a principal debtor, and in relation to one and the same transaction. Courts of law have borrowed their jurisdiction on this subject from courts of equity; and along with it they have taken the maxim that equality is equity. The obligation to contribute may, of course, be modified by contract between the sureties; and without any contract, a second surety may enter into the obligation for his principal in such a form that the first surety cannot call on him for contribution. But that is only where, by the terms of his undertaking, he treats all those who have preceded him as principal debtors. And in such a case, as he refuses to take upon himself the burden of a co-surety, he renounces the benefit incident to that relation. If he will not contribute when the other surety pays the debt, he shall not have contribution when he pays it himself. These principles will be sufficiently illustrated and established by a reference to a few cases. Deering v. The Earl of Winchelsea, 2 B. & P. 270; 1 Cox, 318, s. c.; Campbell v. Mesier, 4 John. Ch. 334, 8 Am. Dec. 570; Davies v. Humphreys, 6 Mees. & Wel. 167; Mayhew v. Crickett, 2 Swanst. 193; Warner v. Price, 3 Wend. 397; Lapham v. Barnes, 2 Vt. 213; Harris v. Warner, 13 Wend. 400; Craythorne v. Swinburne, 14 Ves. 160; Story on Cont. § 584; Pitman, Pr. & Su. 147. * * *

[10] A portion of the opinion is omitted.

It is of no consequence in a legal point of view, that the plaintiffs did not know when they signed the note that the defendant was also to be a surety. The defendant made himself a co-surety by becoming a party to the same contract, without any qualification of his undertaking. This was admitted by Lord Eldon in Craythorne v. Swinburne, 14 Ves. 160; and is abundantly established by Warner v. Price, 3 Wend. 397, and Lapham v. Barnes, 2 Vt., 213. The last case goes much beyond the one at bar; for there the second surety did not sign the note until after it had become a valid security in the hands of the creditor; while here the note never had any vitality until after all the parties had signed it.

Nor do I see that what passed between the principal debtors and the defendant can in any way affect the question. Notwithstanding all that was said, the defendant did become a co-surety with the plaintiffs; and by that act he acquired all the rights, and became subject to all the liabilities incident to that relation. The mistake which Schuyler & Akin made when they undertook to expound the law, by telling the defendant what would be the force or effect of his contract, could not change or modify the contract itself, nor the consequences which must flow from it.

Much stress is laid upon the fact that this is an action of assumpsit, and the circumstances are such as to repel the idea that a promise to contribute was ever made. But when it was settled that courts of law would enforce contribution between sureties, what was before only an equitable, became a legal obligation; and where there is a legal right to demand a sum of money, and there is no other remedy, the law will, for all the purposes of a remedy, imply a promise of payment. Birkley v. Presgrave, 1 East, 220; Bachelder v. Fiske, 17 Mass. 464; Cowell v. Edwards, 2 B. & P. 268; Chit. on Cont. 24, Ed. of 1842.

We think the plaintiffs are entitled to recover. New trial granted.[11]

McCREADY v. VAN ANTWERP.

(Supreme Court of New York, 1881. 24 Hun, 322.)

Appeal from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

BRADY, J. It appears that the plaintiff and the defendant executed a joint and several bond or obligation by which they agreed to pay to certain trustees, on the 5th of December, 1882, the sum of $100,000, and to pay interest thereon semi-annually, on the fifth days of June and December in each year, at the rate of six per cent per annum, the bond being secured by a mortgage of even date on certain real estate belonging to them. Six months' interest, which amounted to $3,000,

[11] For other cases on the surety's right to contribution see Ames' Cases on Suretyship, 533 et seq.; Hening's Cases on Suretyship, 325 et seq.

became due and payable on the bond on the 5th day of December, 1878. The plaintiff paid the whole of it, namely, $3,000, $1,500 being paid on the 26th of December, 1878, and $1,500 on the 22d of January, 1879, with thirteen dollars and seventy cents on the latter as interest upon the $1,500, which was not paid when it became due. But the defendant paid nothing to the obligees in the bond in regard to that interest, and nothing to the plaintiff on account of the payment made for him.

The defendant and appellant interposed no set-off or counterclaim against the plaintiff or the obligees on the bond, and relies upon the proposition that the payment by the plaintiff was gratuitous; that he was not compelled to pay it, nor requested nor authorized to do so by the defendant.

It is apparent, however, that there was a delay in the payment of one-half of the $3,000, because it was not made until the 22d of January 1879, although it became due on the 5th of December, 1878. The obligation in this case was joint and several, as already suggested; and the bonds having been secured by a mortgage the right of the mortgagee to foreclose, if the interest were not paid, cannot be questioned. The non-payment of the interest imperiled the estate, for the protection of which the whole interest was paid, the plaintiff's portion as well as the defendant's portion, and such payment may well be regarded as compulsory. An examination of the question presented leads to the conclusion that there is no good reason in law or in morals why the defendant should not be required to pay his part of the money thus expended, and inferentially for his benefit.

It is true that the rule of contribution applies to sureties and not to original joint debtors. But as the parties herein were not copartners they may be regarded as quasi sureties for each other; and if that be not a possible result, then the plaintiff ought in justice to be regarded and to be declared the equitable assignee of the claim of the obligees on the bond against the defendant to the extent of one-half of the interest due.

As already suggested there does not seem to be any reason, aside from some refinements growing out of the old rules of special pleading, why if two original debtors are bound to pay a sum of money and one pays the whole of it the other should not respond, particularly in a case like this where there are no copartnership complications. Where such a controversy as this arises between partners it is true a different rule would prevail, because the liability of each of them to the other would depend upon the result of an account to be taken, in which various transactions with various phases interpose.

There can be no injustice in the adoption of such a rule here, inasmuch as it would be controlled in its application by all existing rights, either as against the obligees on the bond or the plaintiff himself, for this would secure for the co-obligor for whom payment was made the ability to make any defense which he could set up if the action were

brought directly upon the bond; besides, to maintain the rigorous rule which is called into requisition by the defendant might lead to great injustice. In a case like this, for example, where the bond is secured by a pledge of real estate, the plaintiff might be compelled to make several similar payments prior to the time when the mortgage became due in order to protect the estate from foreclosure, a proceeding which might be disastrous.

The defendant, as already suggested, being under obligations to pay, and having omitted to do so, and the omission exposing the pledge to sale, and having no defense except a technical one resting upon a doubtful rule of law in its general application, we think, for the reason assigned, that the judgment should be affirmed, with costs.

Judgment affirmed, with costs.[12]

(B) Between Tort-Feasors

MERRYWEATHER v. NIXAN.

(Court of King's Bench, 1799. 8 Term R. 186.)

One Starkey brought an action on the case against the present plaintiff and defendant for an injury done by them to his reversionary estate in a mill, in which was included a count in trover for the machinery belonging to the mill; and having recovered £840. he levied the whole on the present plaintiff, who thereupon brought this action against the defendant for a contribution of a moiety, as for so much money paid to his use.

At the trial before Mr. Baron Thomson at the last York assizes the plaintiff was nonsuited, the learned Judge being of opinion that no

[12] Accord: Harvey v. Drew (1876) 82 Ill. 606; Durbin v. Kuney (1890) 19 Or. 71, 23 Pac. 661.

See, also, Aspinwall v. Sacchi (1874) 57 N. Y. 331, where Earl, C., said: "It will thus be seen that it is no answer to a claim for contribution that it cannot be based upon any contract, that the parties are severally and not jointly bound, that they are bound by separate instruments, that they are liable for the same debt or obligation in different amounts, that it can make no difference whether they be principal debtors or mere sureties, and that the doctrine of contribution rests upon the broad principle of justice, that when one has discharged a debt or obligation, which others were equally bound with him to discharge, and thus removed a common burden, the others, who have received a benefit ought, in conscience, to refund to him a ratable proportion. This is, therefore, a proper case for contribution."

Contribution Between Statutory Co-Obligors.—In Manthey v. Schueler (1914) 126 Minn. 87, 147 N. W. 824, Ann. Cas. 1915D, 241, plaintiff and defendant were the two grandfathers of four young children, whose father had deserted them and whose mother was unable to support them. By statute a duty to support such dependent children was imposed on their grandparents. Plaintiff had supported three of the children and defendant had supported one and refused to support or aid in support of the others. The court sustained an action to recover contribution, saying: "The burden was a common and equal one imposed by the statute and rightly assumed by either of the grandparents. Equality of burden results equitably in equality of payment and one properly paying more than his proportion may recover at law by way of contribution."

contribution could by law be claimed as between joint wrong-doers; and consequently this action upon an implied assumpsit could not be maintained on the mere ground that the plaintiff had alone paid the money which had been recovered against him and the other defendant in that action.

Chambre now moved to set aside the nonsuit; contending that, as the former plaintiff had recovered against both these parties, both of them ought to contribute to pay the damages. But

Lord Kenyon, C. J., said there could be no doubt but that the nonsuit was proper; that he had never before heard of such an action having been brought where the former recovery was for a tort. That the distinction was clear between this case and that of a joint judgment against several defendants in an action of assumpsit. And that this decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right.

Rule refused.[13]

WOOLEY v. BATTE.

(At Nisi Prius, before Park, J., 1826. 2 Car. & P. 417.)

Assumpsit for contribution. Plea—General issue. The plaintiff and defendant were joint proprietors of a stage coach; and damages had been recovered in an action on the case, against the former only, for an injury done to Mrs. Jeavons, a passenger, by reason of the negligence of the coachman. The plaintiff had paid the whole of the damages and costs, and brought the present action to recover half the amount from the defendant as his partner.

For the plaintiff, an examined copy of the judgment against him at the suit of the husband of Mrs. Jeavons, was put in. The declaration was in case, and stated the injury to have arisen from the negligence of the present plaintiff and his servants, (in the usual form.) It was also proved, that the plaintiff paid the amount of damages and costs in that action, amounting to £176., under an execution;

[13] In Johnson v. Torpy (1892) 35 Neb. 604, 53 N. W. 575, 37 Am. St. Rep. 447, plaintiff and defendant, both saloonkeepers, wrongfully sold liquor to a "common drunkard," which caused or contributed to his death. The widow of deceased had recovered from plaintiff under the civil damage act. Held, no right to enforce contribution, since plaintiff must be presumed to have known that the sale of liquor to the deceased was a wrongful and unlawful act, for which he was liable to be punished by indictment.

In Sutton v. Morris (1898) 102 Ky. 611, 44 S. W. 127, the parties, seemingly in good faith, cut timber on another's land in violation of a criminal statute. Held, no right to enforce contribution with respect to the fine and costs imposed on plaintiff pursuant to an indictment.

In Sharp v. Call (1903) 69 Neb. 72, 95 N. W. 16, 96 N. W. 1004, the trustees of a corporation knowingly paid out all its assets to stockholders in the face of pending claims by creditors. Held, that one trustee who has been forced to make restitution for such misappropriation cannot have contribution against a co-trustee.

Contra: City of Ft. Scott v. Kansas City, Ft. S. & M. R. Co. (1903) 66 Kan. 610, 72 Pac. 238 (statutory).

that the plaintiff and the defendant were partners in the stage coach; and that the plaintiff was not personally present when the accident happened.

Jervis, for the defendant, contended, that as the action brought against the plaintiff was an action on the case for negligence, the plaintiff and defendant were joint tort feazors; and, therefore, one only being sued, he could not recover contribution from the other; and he cited Merryweather v. Nixan.

Campbell, for the plaintiff. No doubt the case of Merryweather v. Nixan is good law, and one tort feazor sued alone cannot recover contribution from another, who was a joint tort feazor with him; but here it is proved, that there was no personal fault in the plaintiff. The declaration of Jeavons against the present plaintiff might, with equal propriety, have been in assumpsit; in which case, the present plaintiff might clearly have recovered contribution; and it can hardly be contended, that the plaintiff should be deprived of his contribution by Mr. Jeavons' pleader drawing his declaration in one form instead of another.

PARK, J. I think the plaintiff is entitled to recover.

Verdict for the plaintiff—Damages, £88.[14]

ACHESON v. MILLER.

(Supreme Court of Ohio, 1853. 2 Ohio St. 203, 59 Am. Dec. 663.)

Error to the common pleas of Trumbull county.

CALDWELL, J.[15] The suit in the court below was one for contribution. The plaintiff in the action, and the defendant with four others, were the sureties for Garry Lewis on a draft for five thousand dollars. Lewis became insolvent, and judgment was rendered against all the indorsers, and also a judgment against Lewis, the principal. Execution was issued and four of the indorsers, of whom Reuel Miller was

[14] Accord: Bailey v. Bussing (1859) 28 Conn. 455, in which case the court said: "The reason assigned in the books for denying contribution among trespassers is, that no right of action can be based on a violation of law, that is, where the act is known to be such or is apparently of that character. A guilty trespasser cannot be allowed to appeal to the law for an indemnity, for he has placed himself without its pale by contemning it, and must ask in vain for its interposition in his behalf. If, however, he was innocent of an illegal purpose, ignorant of the nature of the act, which was apparently correct and proper, the rule will change with its reason, and he may have an indemnity, or as the case may be a contribution. * * * We must look for personal participation, personal culpability, personal knowledge. If we do not find these circumstances, but perceive only a liability in the eye of the law, growing out of a mere relation to the perpetrator of the wrong, the maxim of law that there is no contribution among wrongdoers is not to be applied."

The employer, who, in accordance with the doctrine of respondeat superior, has been forced to pay damages to a third party for the tort of his servant, may recover indemnity from such servant. Bailey v. Bussing (1859) 28 Conn. 455; Grand Trunk Railway Co. v. Latham (1874) 63 Me. 177; Bradley v. Rosenthal (1908) 154 Cal. 420, 97 Pac. 875, 129 Am. St. Rep. 171.

[15] A portion of the opinion is omitted.

one, having indemnified the sheriff, directed him to levy on a store of goods recently the property and in the possession of Garry Lewis, the principal debtor, but which goods were assigned about that time to Daniel Gilbert. Gilbert brought suit against the sheriff and the four indorsers that directed him to levy, and recovered a judgment for the sum of five thousand three hundred and fifty-four dollars and sixty-one cents, the value of the goods, which judgment was paid off by these four indorsers. Miller paid the one fourth of it. The goods were sold by the sheriff, and applied on the judgment, and paid on it three thousand one hundred and thirty-five dollars and seventy-three cents. Acheson, not having anything to do with the levy on the goods, has paid nothing, and this suit was brought by Miller against Acheson to require him to contribute his share of the three thousand one hundred and thirty-five dollars and seventy-three cents paid on the judgment by the sale of the goods.

On the trial in the court of common pleas, after the plaintiff had given in his evidence and rested, the defendant moved for a nonsuit, which the court refused, and gave judgment for the plaintiff. The defendant presented a bill of exceptions, setting forth the evidence, which was signed and made a part of the record. The question presented on this record is, whether contribution can be had in such a case.

It is said, on the part of the plaintiff in error, that Miller and those who acted with him were wrong-doers—that they committed a trespass in having the goods levied on, and that therefore he is not entitled to contribution for the payment made by the proceeds of such goods.

The rule that no contribution lies between trespassers, we apprehend, is one not of universal application. We suppose it only applies to cases where the persons have engaged together in doing wantonly or knowingly a wrong. The case may happen that persons may join in performing an act which to them appears to be right and lawful, but which may turn out to be an injury to the rights of some third party, who may have a right to an action of tort against them.

In such case, if one of the parties who has done the act has been compelled to pay the amount of the damage, is it not reasonable that those who were engaged with him in doing the injury should pay their proportion? The common understanding and justice of humanity would say that it would be just and right that each of the parties to the transaction should pay his proportion of the damage done by their joint act; and we see no reason why the moral sense of the court shall be shocked by such a result. And we think this view of the case is fully sustained by the cases cited by counsel for the defendant in error. In the case of Adamson v. Jarvis, 4 Bing. 66, in speaking on this subject, Best, C. J., says: "From the concluding part of Lord Kenyon's judgment in Merryweather v. Nixan, 8 T. R. 186, and from reason, justice, and sound policy, the rule that wrongdoers can not have redress or contribution against each other is confined to

cases where the person seeking redress must be presumed to have known that he was doing a wrong."

The same doctrine is distinctly laid down in the case of Betts v. Gibbins, 2 Ad. & El. 57. From these and other cases referred to, we think the reasonable and common-sense rule and the legal one are the same, viz.: That when parties think they are doing a legal and proper act, contribution will be had; but when the parties are conscious of doing a wrong, courts will not interfere.

But the question arises whether this is a case where contribution is sought between wrong-doers. We think not. The suit in this case is not brought by Miller for contribution towards the amount he has paid in the judgment in trespass, but for Acheson's proportion of the amount paid on the judgment by the sale of the goods. These goods, by the judgment and satisfaction in the trespass case, became the property of the defendants in that case. * * *

We do not discover any error in the record of the court of common pleas; the judgment of that court will therefore be affirmed.[16]

ARMSTRONG COUNTY v. CLARION COUNTY.

(Supreme Court of Pennsylvania, 1870. 66 Pa. 218, 5 Am. Rep. 368.)

Error to the Court of Common Pleas of Clarion County.

This was an action of assumpsit by the County of Armstrong against the County of Clarion for contribution. At the trial the court directed a nonsuit.

READ, J.[17] The bridge across Red Bank creek, between the counties of Armstrong and Clarion, at the place known as the Rockport Mills, was a county bridge, maintained and kept in repair at the joint and equal charge of both counties. Whilst John A. Humphreys was crossing the bridge it fell and he was severely injured; he brought suit for damages against the county of Armstrong; and on the trial, under the charge of the court, there was a verdict for defendant. This was reversed on writ of error (6 P. F. Smith [56 Pa.] 204); and upon a second trial there was a verdict for the plaintiff for $1,100 damages, on which judgment was entered. This judgment, with interest and costs, was paid by Armstrong county, and the present suit is to recover contribution from Clarion county. On the trial the learned judge nonsuited the plaintiff on the ground that one of two joint wrongdoers cannot have contribution from the other.

[16] While the principal case is hardly more than a dictum, the authorities are in accord. Vandiver v. Pollak (1893) 97 Ala. 467, 12 South. 473, 19 L. R. A. 628; Farwell v. Becker (1889) 129 Ill. 261, 21 N. E. 792, 6 L. R. A. 400, 16 Am. St. Rep. 267. Compare Paddock-Hawley Iron Co. v. Rice (1903) 179 Mo. 480, 78 S. W. 634.

[17] The statement of facts is omitted.

The commissioners of the two counties had examined the bridge in the summer and ordered some repairs which were made. There can be little doubt that morally Clarion county was bound to pay one-half of the sum recovered from and paid by Armstrong county, and the question is, does not the law make the moral obligation a legal one? Merryweather v. Nixan, 8 Term R. 186, the leading case on the subject, was of a joint injury to real estate, and for the joint conversion of personal property, being machinery in a mill. In Colburn v. Patmore, 1 Cr., M. & R. 73, the proprietor of a newspaper who, for a libel published in it, was subjected to a criminal information, convicted and fined, sought to recover from his editor who was the author of the libel, the expenses which he had incurred by his misfeasance; Lord Lyndhurst said: "I know of no case in which a person who has committed an act declared by the law to be criminal, has been permitted to recover compensation against a person who has acted jointly with him in the commission of the crime."

So in Arnold v. Clifford, 2 Sumn. 238, Fed. Cas. No. 555, it was held, a promise to indemnify the publisher of a libel is void. "No one," said Judge Story, "ever imagined that a promise to pay for the poisoning of another was capable of being enforced in a court of justice."

In Miller v. Fenton, 11 Paige (N. Y.) 18, the wrongdoers were two of the officers of a bank, who had fraudulently abstracted its funds, and of course there could be no contribution, between criminals. In the case of The Attorney-General v. Wilson, 4 Jurist, 1174, cited in the above case by the chancellor, and also reported in 1 Craig & Phillips, 1, where it was contended that all the persons charged with the breach of trust should be made parties, Lord Cottenham said: "In cases of this kind where the liability arises from the wrongful act of the parties, each is liable for all the consequences, and there is no contribution between them, and each case is distinct, depending upon the evidence against each party. It is therefore not necessary to make all parties who may more or less have joined in the act complained of." Seddon v. Connell, 10 Simons, 81, is to the same effect.

In Story on Partnership, § 220, after speaking of the general rule that there is no contribution between joint wrongdoers, the author says: "But the rule is to be understood according to its true sense and meaning, which is, where the tort is a known meditated wrong, and not where the party is acting under the supposition of the entire innocence and propriety of the act, and the tort is merely one by construction, or inference of law. In the latter case, although not in the former, there may be and properly is, a contribution allowed by law for such payments and expenses between constructive wrongdoers, whether partners or not." The case of Adamson v. Jarvis, cited by the learned commentator, is in 4 Bing. 66, in which Lord Chief Justice Best, after noticing Merryweather v. Nixan, says: "The case of Philips v. Biggs, Hardress, 164 [which was on the equity side of

the Exchequer], was never decided; but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors. From the inclination of the court in this last case, and from the concluding part of Lord Kenyon's judgment in Merryweather v. Nixan, and from reason, justice and sound policy, the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known he was doing an unlawful act."

In Betts v. Gibbins, 2 Ad. & E. 57, Lord Denman said: "The case of Merryweather v. Nixan, 8 T. R. 186, seems to me to have been strained beyond what the decision will bear—the present case is an exception to the general rule. The general rule is, that between wrongdoers there is neither indemnity nor contribution. The exception is where the act is not clearly illegal in itself, and Merryweather v. Nixan, 8 T. R. 186, was only a refusal of a rule nisi. * * * In Adamson v. Jarvis, 4 Bing. 66, we have the observations of a learned person familiar with commercial law."

A promise to indemnify against an act not known to the promisee at the time to be unlawful is valid. Coventry v. Barton, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; Stone v. Hooker, 9 Cow. (N. Y.) 154.

In Pearson v. Skelton, 1 Mee. & Wels. 504, where one stagecoach proprietor had been sued for the negligence of a driver, and damages had been recovered against him, which he had paid, and he sought contribution from another of the proprietors, it was held that the rule there, no contribution between joint tort-feasors, does not apply to a case where the party seeking contribution was a tort-feasor only by inference of law, but is confined to cases where it must be presumed that the party knew he was committing an unlawful act.

The same doctrine was maintained in Wooley v. Batte, 2 C. & P. 417.

These cases have been followed in this court in Horbach's Administrators v. Elder, 18 Pa. (6 Harris) 33. "Here," said Judge Coulter, "the plaintiff and defendant are in æquali jure. The plaintiff has exclusively borne the burden which ought to have been shared by the defendant, who therefore ought to contribute his share."

"Contribution," says Lord Chief Baron Eyre, in Dering v. Earl of Winchelsea, 1 Cox, 318, "is bottomed and fixed on general principles of natural justice, and does not spring from contract."

These principles rule the case before us. The parties plaintiff and defendant are two municipal corporations, jointly bound to keep this bridge in repair. These bodies can act only by their legally constituted agents, their commissioners, who examine the structure and order repair which is done. They erred in judgment, and both were liable for

the consequences of that error, and one having paid the whole of the damages is entitled to contribution from the other.

Judgment reversed, and venire de novo awarded.[18]

UNION STOCKYARDS CO. v. CHICAGO, B. & Q. R. CO.

(Supreme Court of the United States, 1904. 196 U. S. 217, 25 Sup. Ct. 226, 49 L. Ed. 453, 2 Ann. Cas. 525.)

On a certificate from the United States Circuit Court of Appeals for the Eighth Circuit.

The defendant railroad company delivered a refrigerator car with imperfect brakes to the plaintiff terminal company. Both companies failed to discover the defect, which could have been discovered by proper inspection. One Goodwin an employee of the terminal company, who was injured as a direct result of the defective brakes, sued the terminal company alone and recovered judgment. The present action is brought by the terminal company against the railroad company to recover the amount paid under the judgment. The circuit court sustained a demurrer to the plaintiff's petition, and the plaintiff brought error to the Circuit Court of Appeals for the Eighth Circuit. The latter court upon certificate now propounds the following question:

"Is a railroad company which delivers a car in bad order to a terminal company, that is under contract to deliver it to its ultimate destination on its premises for a fixed compensation, to be paid to it by the railroad company, liable to the terminal company for the damages which the latter has been compelled to pay to one of its employees on account of injuries he sustained while in the customary discharge of his duty of operating the car, by reason of the defect in it, in a case in which the defect is discoverable upon reasonable inspection?"

MR. JUSTICE DAY [19] delivered the opinion of the court:

We take it that this inquiry must be read in the light of the statement accompanying it. While instruction is asked broadly as to the liability of the railroad company to the terminal company, for damages which the latter has been compelled to pay to one of its own employees on account of injuries sustained, it is doubtless meant to limit the inquiry to cases wherein such recovery was had because of the established negligence of the terminal company in the performance of the specific duty stated, and which it owed to the employee. For it must be taken as settled that the terminal company was guilty of negligence after it received the car in question, in failing to perform

[18] Accord: Nickerson v. Wheeler (1875) 118 Mass. 295; Ankeny v. Moffett (1887) 37 Minn. 109, 33 N. W. 320; Eaton & Prince Co. v. Mississippi Valley Trust Co. (1906) 123 Mo. App. 117, 100 S. W. 551.

See, also, Palmer v. Wick, [1894] A. C. 318.

[19] The statement of facts is abridged and portions of the opinion are omitted.

the duty of inspection required of it as to its own employee. The case referred to in the certificate (Union Stock-Yards Co. v. Goodwin, 57 Neb. 138, 77 N. W. 357) is a final adjudication between the terminal company and the employee, and it therein appears that the liability of the company was based upon the defective character of the brake, which defect a reasonably careful inspection by a competent inspector would have revealed, and it was held that in permitting the employee to use the car without discovering the defect the company was rendered liable to him for the damages sustained. We have, therefore, a case in which the question of the plaintiff's negligence has been established by a competent tribunal, and the inquiry here is, may the terminal company recover contribution, or, more strictly speaking indemnity, from the railroad company because of the damages which it has been compelled to pay under the circumstances stated?

Nor is the question to be complicated by a decision of the liability of the railroad company to the employee of the terminal company, had the latter seen fit to bring the action against the railroad company alone, or against both companies jointly. There seems to be a diversity of holding upon the subject of the railroad company's liability under such circumstances, in courts of high authority.[20] * * *

Coming to the very question to be determined here, the general principle of law is well settled that one of several wrongdoers cannot recover against another wrongdoer, although he may have been compelled to pay all the damages for the wrong done. In many instances, however, cases have been taken out of this general rule, and it has been held inoperative in order that the ultimate loss may be visited upon the principal wrongdoer, who is made to respond for all the damages, where one less culpable, although legally liable to third persons, may escape the payment of damages assessed against him by putting the ultimate loss upon the one principally responsible for the injury done. These cases have, perhaps, their principal illustration in that class wherein municipalities have been held responsible for injuries to persons lawfully using the streets in a city, because of defects in the streets or sidewalks caused by the negligence or active fault of a property owner. In such cases, where the municipality has been called upon to respond because of its legal duty to keep public highways open and free from nuisances, a recovery over has been permitted for indemnity against the property owner, the principal wrongdoer, whose negligence was the real cause of the injury.[21]

[20] The court here briefly discussed Moon v. Northern Pacific Railroad Company (1891) 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194, and Pennsylvania Railroad Company v. Snyder (1896) 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700, imposing liability on the railroad company on the facts of the principal case, and Glynn v. Central R. R. Co. (1900) 175 Mass. 510, 56 N. E. 698, 78 Am. St. Rep. 507, and M., K. & T. R. R. Co. v. Merrill (1902) 65 Kan. 436, 70 Pac. 358, 59 L. R. A. 711, 93 Am. St. Rep. 287 contra.

[21] In addition to the authorities on this point noted in the principal case, see in accord Baltimore & Ohio Railroad Co. v. County Commissioners of

Of this class of cases is Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 40 L. Ed. 712, 16 Sup. Ct. 564, in which a resident of the city of Washington had been injured by an open gas box, placed and maintained on the sidewalk by the gas company, for its benefit. The District was sued for damages, and, after notice to the gas company to appear and defend, damages were awarded against the District, and it was held that there might be a recovery by the District against the gas company for the amount of damages which the former had been compelled to pay. Many of the cases were reviewed in the opinion of the court, and the general principle was recognized that, notwithstanding the negligence of one, for which he has been held to respond, he may recover against the principal delinquent where the offense did not involve moral turpitude, in which case there could be no recovery, but was merely malum prohibitum, and the law would inquire into the real delinquency of the parties, and place the ultimate liability upon him whose fault had been the primary cause of the injury.

The same principle has been recognized in the court of appeals of the state of New York in Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 897, the second proposition of the syllabus of the case being: "Where, therefore, a person has been compelled, by the judgment of a court having jurisdiction, to pay damages caused by the negligence of another, which ought to have been paid by the wrongdoer, he may recover of the latter the amount so paid, unless he was a party to the wrong which caused the damage."

In a case cited and much relied upon at the bar (Gray v. Boston Gaslight Co., 114 Mass. 149, 19 Am. Rep. 324), a telegraph wire was fastened to the plaintiff's chimney without his consent, and, the weight of the wire having pulled the chimney over into the street, to the injury of a passing traveler, an action was brought against the property owner for damages, and notice was duly given to the gas company, which refused to defend. Having settled the damages at a figure which the court thought reasonable, the property owner brought suit against the gas company, and it was held liable. In the opinion the court said: "When two parties, acting together, commit an illegal or wrongful act, the party who is held responsible for the act cannot have indemnity or contribution from the other, because both are equally culpable or participes criminis, and the damage results from their joint offense. This rule does not apply when one does the act or creates

Howard County (1910) 113 Md. 404, 77 Atl. 930; Phœnix Bridge Co. v. Creem (1905) 102 App. Div. 354, 92 N. Y. Supp. 855 (contractor entitled to indemnity from subcontractor for negligent injury to a traveler); City of Grand Forks v. Paulsness (1909) 19 N. D. 293, 123 N. W. 878, 40 L. R. A. (N. S.) 1158.

Contra: City of Louisville v. Louisville Ry. Co. (1913) 156 Ky. 141, 160 S. W. 771, 49 L. R. A. (N. S.) 350.

See, also, Nashua Iron & Steel Co. v. Worcester, & N. R. Co. (1882) 62 N. H. 159; Austin Electric Railway Co. v. Faust (Tex. Civ. App. 1911) 133 S. W. 449.

the nuisance, and the other does not join therein, but is thereby exposed to liability and suffers damage. He may recover from the party whose wrongful act has thus exposed him. In such cases the parties are not in pari delicto as to each other, though, as to third persons, either may be held liable." * * *

Other cases might be cited which are applications of the exception engrafted upon the general rule of noncontribution among wrongdoers, holding that the law will inquire into the facts of a case of the character shown, with a view to fastening the ultimate liability upon the one whose wrong has been primarily responsible for the injury sustained. In the present case there is nothing in the facts as stated to show that any negligence or misconduct of the railroad company caused the defect in the car which resulted in the injury to the brakeman. That company received the car from its owner, the Hammond Packing Company, whether in good order or not the record does not disclose. It is true that a railroad company owes a duty of inspection to its employees as to cars received from other companies as well as to those which it may own. Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 39 L. Ed. 624, 15 Sup. Ct. 491. But in the present case the omission of duty for which the railroad company was sought to be held was the failure to inspect the car with such reasonable diligence as would have discovered the defect in it. It may be conceded that, the railroad company having a contract with the terminal company to receive and transport the cars furnished, it was bound to use reasonable diligence to see that the cars were turned over in good order, and a discharge of this duty required an inspection of the cars by the railroad company upon delivery to the terminal company. But that the terminal company owed a similar duty to its employees, and neglected to perform the same, to the injury of an employee has been established by the decision of the supreme court of Nebraska, already referred to.

The case then stands in this wise: The railroad company and the terminal company have been guilty of a like neglect of duty in failing to properly inspect the car before putting it in use by those who might be injured thereby. We do not perceive that, because the duty of inspection was first required from the railroad company, the case is thereby brought within the class which holds the one primarily responsible, as the real cause of the injury, liable to another less culpable, who may have been held to respond for damages for the injury inflicted. It is not like the case of the one who creates a nuisance in the public streets; or who furnishes a defective dock; or the case of the gas company, where it created the condition of unsafety by its own wrongful act; or the case of the defective boiler, which blew out because it would not stand the pressure warranted by the manufacturer. In all these cases the wrongful act of the one held finally liable created the unsafe or dangerous condition from which the injury resulted. The principal and moving cause, resulting in the injury

sustained, was the act of the first wrongdoer, and the other has been held liable to third persons for failing to discover or correct the defect caused by the positive act of the other.

In the present case the negligence of the parties has been of the same character. Both the railroad company and the terminal company failed, by proper inspection, to discover the defective brake. The terminal company, because of its fault, has been held liable to one sustaining an injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another.

For the reasons stated, the question propounded will be answered in the negative.[22]

HOGGAN v. CAHOON.

(Supreme Court of Utah, 1903. 26 Utah, 444, 73 Pac. 512, 99 Am. St. Rep. 837.)

Appeal from District Court, Sanpete County; Jacob Johnson, Judge.

Action by James W. Hoggan against James C. Cahoon, Sr. From a judgment in favor of defendant, plaintiff appeals.

BARTCH, J.[23] This action was commenced in the district court of Sanpete county on November 9, 1901, to recover from the defendant the sum of $290.35 and interest, alleged to be due on an implied contract of indemnity. * * * To the complaint the defendant interposed a demurrer, as follows: * * * "(2) That said complaint does not state facts sufficient to constitute a cause of action." Upon the hearing of the demurrer, the court decided against the plaintiff upon both grounds, and dismissed the action.

We will, in the first instance, consider the question whether the complaint states a cause of action. The appellant insists that facts sufficient are stated to constitute a case for indemnity, within the exceptions to the rule refusing indemnity between joint tort feasors. For the purpose of this decision, the judgment appealed from having been rendered upon demurrer, the facts alleged in the complaint must be assumed to be true. Therefrom it appears that the defendant appointed the plaintiff as his agent for the purpose of transacting certain specific business, which was to take into possession certain goods and chattels, and

[22] Accord: Spalding v. Oakes (1869) 42 Vt. 343; City of Tacoma v. Bonnell (1911) 65 Wash. 505, 118 Pac. 642, 36 L. R. A. (N. S.) 582; Central of Georgia Railway Co. v. Macon Railway & Light Co. (1911) 9 Ga. App. 628, 71 S. E. 1076; Consolidated Kansas City Smelting & Refining Co. v. Binkley (1907) 45 Tex. Civ. App. 100, 99 S. W. 181.

See 12 Harvard Law Review, 176; 15 Columbia Law Review, 717; 1 Virginia Law Review, 313.

[23] Portions of the opinion are omitted.

transport them to a particular place named. The agent proceeded to, and did, transact the business of the agency at the special instance and under the direction of his principal; and, although the goods and chattels were covered by a mortgage held by the principal, the agent was not aware that the taking and carrying away of them as directed by the principal constituted a tort. He, as appears, acted in good faith, and upon the faith of the representations and assurances of the principal that such taking was lawful and proper. Thereafter a third person brought suit against the agent for the goods and chattels, and recovered judgment against him for a considerable sum, which sum the agent was compelled to, and did pay, together with the expenses incurred in the defense of the suit. The principal was aware of that litigation and of the payment of the resulting judgment and expenses, but, upon demand made by the agent for reimbursement, refused to comply with the demand. While some of the allegations showing these facts may be subject to the criticism of being indefinite and uncertain, and might be vulnerable to a specific plea, we apprehend the ultimate facts are sufficiently alleged to withstand a general demurrer. If the allegations are in fact true, the plaintiff has a right of recovery. The facts stated are such as to characterize the case as an exception to the rule of law that tort feasors or wrongdoers cannot have redress against each other.

That rule applies to cases where he who seeks redress knew or must be presumed to have known that the transaction which resulted in the damages he was compelled to pay was tortious and unlawful. But where, as appears from the allegations in this case, an agent acts in good faith for his principal, under the principal's direction, and relies upon his representations that the transaction is lawful, and the same is not manifestly unlawful, the law implies indemnity, for damages of third parties, to the agent from the principal; and if, as the result of acts so performed, the agent is mulcted in damages, the principal must respond to the agent for the same, as well as for the necessary expenses incurred in resisting the claims of third parties who were injured by the transaction. "The agent has the right to assume that the principal will not call upon him to perform any duty which would render him liable in damages to third persons. Having no personal interest in the act, other than the performance of his duty, the agent should not be required to suffer loss from the doing of an act apparently lawful in itself, and which he has undertaken to do by the direction and for the benefit and advantage of his principal. If in the performance of such an act, therefore, the agent invades the rights of third persons, and incurs liability to them, the loss should fall rather upon him for whose benefit and by whose direction it was done, than upon him whose only intention was to do his duty to his principal. Wherever, then, the agent is called upon by his principal to do an act which is not manifestly illegal, and which he does not know to be wrong, the law implies a promise on the part of the principal to in-

demnify the agent for such losses and damages as flow directly and immediately from the execution of the agency. Thus an agent is entitled to be indemnified when he is compelled to pay damages for taking personal property by direction of his principal, which, though claimed adversely by another, he has reasonable ground to believe to belong to his principal." Mechem on Agency, § 653.

In Story on Agency, § 339, the author says: "It may be stated, as a general principal of law, that an agent who commits a trespass or other wrong to the property of a third person by the direction of his principal, if at the time he has no knowledge or suspicion that it is such a trespass or wrong, but acts bona fide, will be entitled to a reimbursement and contribution from his principal for all the damages which he sustains thereby. For, although the general doctrine of the common law is that there can be no reimbursement or contribution among wrongdoers, whether they are principals or are agents, yet that doctrine is to be received with the qualification that the parties know at the time that it is a wrong. And in all these cases there is no difference whether there be a promise of indemnity or not, for the law will not enforce a contract of indemnity against a known and meditated wrong; and, on the other hand, where the agent acts innocently and without notice of the wrong, the law will imply a promise on the part of the principal to indemnify him. The same doctrine applies to all other cases of losses or damages sustained by an agent in the course of the business of his agency, if they are incurred without any negligence or default on his own part."

In Jacobs v. Pollard, 10 Cush. (Mass.) 287, 57 Am. Dec. 105, Mr. Justice Bigelow said: "It is undoubtedly the policy of the law to discountenance all actions in which a party seeks to enforce a demand originating in a willful breach or violation on his part of the legal rights of others. Courts of law will not lend their aid to those who found their claims upon an illegal transaction. No one can be permitted to relieve himself from the consequences of having intentionally committed an unlawful act by seeking an indemnity or contribution from those with whom or by whose authority such unlawful act was committed. But justice and sound policy, upon which this salutary rule is founded, alike require that it should not be extended to cases where parties have acted in good faith, without any unlawful design, or for the purpose of asserting a right in themselves or others, although they may have thereby infringed upon the legal rights of third persons. It is only where a person knows, or must be presumed to know, that his act was unlawful, that the law will refuse to aid him in seeking an indemnity or contribution."

So, in Moore v. Appleton, 26 Ala. 633, Mr. Justice Rice, speaking for the court, said: "We admit the rule that the law will not enforce contribution nor indemnity between wrongdoers. But that rule does not apply to any case where the act of the agent was not manifestly illegal in itself, and was done bona fide in the execution of his agency,

and without knowledge (either actual or implied by law) that it was illegal." Story on Agency, § 340; Cooley on Torts, 145–149; Culmer v. Wilson, 13 Utah, 129, 44 Pac. 833, 57 Am. St. Rep. 713; Nelson v. Cook, 17 Ill. 443; Gower v. Emery, 18 Me. 79; Avery v. Halsey, 14 Pick. (Mass.) 174; Coventry v. Barton, 17 Johns. (N. Y.) 142, 8 Am. Dec. 376; Moore v. Appleton, 34 Ala. 147, 73 Am. Dec. 448.

From the foregoing considerations, we are of the opinion that the complaint is not subject to demurrer on the ground that it stated no cause of action. * * *

We are of the opinion that the court erred in sustaining the demurrer. The judgment must be reversed, with costs and the cause remanded, with directions to the court below to reinstate the case, overrule the demurrer, and proceed according to law. It is so ordered.[24]

SECTION 2.—DURESS

ASTLEY v. REYNOLDS.

(Court of King's Bench, 1731. 2 Strange, 915.)

In an action for money had and received to the plaintiff's use, the case reserved for the consideration of the Court was, that above three years ago, the plaintiff pawned plate to the defendant for £20. and at the three years end came to redeem it, and the defendant insisted to have £10. for the interest of it, and the plaintiff tendered him £4. knowing £4. to be more than legal interest. That the defendant refusing to take it, they parted; and at some months distance, the plaintiff came and made a second tender of the £4. but the defendant still insisting upon £10. the plaintiff paid it and had his goods: and now brings this action for the surplus beyond legal interest.

It was argued for the defendant, that there was no colour to say the plaintiff paid it either by mistake or force, it being stated that he knew the £4. he tendered was beyond the legal interest; and he did it with his eyes open, having another remedy for his goods by trover after tender of the legal interest; and it falls within the rule volenti non fit injuria.

Et Per Curiam, the cases of payments by mistake or deceit, are not to be disputed; but this case is neither, for the plaintiff knew what he did, in that lies the strength of the objection: but we do not think the tender of the £4. will hurt him, for a man may tender too much, though a tender of too little is bad; and where a man does not know exactly what is due, he must at his peril take care to tender enough.

[24] Accord: Adamson v. Jarvis (1827) 4 Bing. 66.

We think also, that this is a payment by compulsion; the plaintiff might have such an immediate want of his goods, that an action of trover would not do his business: where the rule volenti non fit injuria is applied, it must be where the party had his freedom of exercising his will, which this man had not: we must take it he paid the money relying on his legal remedy to get it back again.

The plaintiff had judgment; and the defendant dying pending the argument, judgment was ordered to be entered nunc pro tunc.[25]

IRVING v. WILSON.

(Court of King's Bench, 1791. 4 Term R. 485.)

This was an action on the case, to recover the sum of £2. 11s. as money had and received by the defendants to the plaintiff's use. At the trial at the last Carlisle Assizes before Thomson, Baron, it appeared, that the defendants, who are Custom-House officers, had seized some hams near Carlisle, which the plaintiff was sending in three several carts from Scotland to Carlisle. The plaintiff obtained one permit for the whole; but owing to some accident, two of the carts were at the distance of two miles behind the other when the defendants met the first and demanded the permit; the driver informed them that the permit was with the other carts which came up in an hour and a half afterwards, before the first reached Carlisle, but not till the officer, after waiting some time without seeing the other carts, had made the seizure. They were all three driven to the Custom-House at Carlisle, the defendants saying they could not release them unless the collector were applied to. When the whole was explained to the collector, he said he would have no concern in the taking; and the defendants then refused to give up the carts with the cargoes, unless the plaintiff could give them £2. 11s.; which he accordingly did. It was objected on the part of the defendants that the plaintiff, by this transaction with Revenue officers, had incurred a penalty of £50. and that he could not recover back the money which he had paid to have

[25] In Lowenstein v. Bache (1910) 41 Pa. Super. Ct. 552, the defendant, a stockbroker, agreed to make advances to the plaintiff, a customer, at five per cent. interest to enable such customer to buy stocks through the broker, the broker to hold the stocks purchased as security for the loans. The broker charged more than five per cent. interest, and when the customer closed his account the broker refused to give up the securities unless the amount of the disputed interest was paid. The customer thereupon paid the broker this amount under protest and with notice that he intended to bring an action to recover it back. Held that assumpsit would lie to recover the money thus paid, the court saying: "When a party is compelled by duress of his person, deeds, papers, or personal property and the evidence of title thereto, to pay money illegally demanded, from which the party making the payment has no other means of immediate and adequate relief, it is not voluntary but compulsory; and he may rescue himself from such duress by payment of the money under protest, and afterwards, on proof of the fact, recover it back."

the goods which had been seized returned to him; and the plaintiff was non-suited, with leave to move to set that non-suit aside, and to enter up a verdict for him, if this Court should be of opinion that the plaintiff could maintain this action.

A rule having been obtained on a former day by Law to shew cause why the nonsuit should not be set aside.

LORD KENYON, C. J. The Revenue laws ought not to be made the means of oppressing the subject. Here, a permit having been granted for the whole quantity of goods, and which was with the other carts behind at the time of the seizure, the seizure was clearly illegal. The permit for the entire quantity, could not be separated and distributed to each of the carts. And therefore whatever ground of probability there was for stopping the first cart, yet after the matter was cleared up, there was no pretence for making a seizure; and it was highly improper in the officers to take the money. If goods liable to a forfeiture be forfeited, the officer is to seize them for the King; but he is not to be permitted to abuse the duties of his station, and to make it a mode of extortion. Here the defendants took the money under circumstances which could by no possibility justify them, and therefore this could not be called a voluntary payment; but it was extorted from the plaintiff, and in that case no notice to the defendants was necessary.

ASHHURST, J. I agree that if this money had been paid as a bribe, both parties would have been in pari delicto, and the plaintiff would not be entitled to recover: but here the plaintiff was in no fault whatever: this money was not paid as a bribe; for the goods were not liable to seizure. Neither was it a voluntary payment; for when the defendants had stopped the goods, the plaintiff was in their power. The defendants acted right in stopping the goods at first; but when the permit came up, there was no pretence to detain them,—still less to take the money. It was a payment by coercion; and which the plaintiff may recover from the defendants as money unconscientiously received by them.

Rule absolute.

CHASE v. DWINAL.

(Supreme Court of Maine, 1830. 7 Greenl. 134, 20 Am. Dec. 352.)

This case, which was assumpsit for money had and received, came before the court upon exceptions taken by the defendant to the opinion of Smith, J., before whom it was tried in the court below.

The plaintiff was conducting his raft down the Penobscot River; and when he came near the boom of the defendant, which was erected under a charter from the State, he was unable to pass it through the passage-way left for that purpose, and by force of the wind and current it was driven eastward of the passage, and stopped by the defendant's boom. The plaintiff, with other assistance, immediately made exertions to free

it from the boom and conduct it through the passage, which in two or three hours was effected. One of the defendant's hired men, who assisted the plaintiff, demanded seventy-five cents for this service, which the plaintiff refused to pay. Afterwards, the defendant demanded of the plaintiff $6.40, being the regular boomage for the raft; which the plaintiff refusing to pay, the defendant stopped and detained the raft till the plaintiff paid the sum demanded; to recover which this action was brought.

There was evidence on both sides tending to show the difficulty of passing the boom, which extended nearly across the river; and on the other hand the facility of passing it, with proper care and skill.

The judge instructed the jury that he considered it intended by the statute authorizing the erection of the boom that the owner should receive a compensation for drift-timber stopped by it, as well as for the timber placed in it for security or convenience. In such cases the owners of the lumber receive a benefit from the boom, and ought to pay the compensation fixed by law. On the contrary, if by reason of the navigation of the river being obstructed by the boom, a raft is impelled by the winds and current, into the boom, against the will of the owner and conductor; who without delay, in a reasonable time, proceed to get it clear from the boom, as was done by the plaintiff; the owner of the raft was not liable to pay the boomage. He further instructed them that if they should find, upon these principles, that the defendant had no right to claim the boomage, and that the plaintiff was obliged to pay the money in order to procure the release of his raft, he might well recover the money in this action.

And the jury having found for the plaintiff, the defendant filed these exceptions pursuant to the statute.

WESTON, J.[26] The defendant claims, in behalf of the Penobscot boom corporation, a right to receive and retain as toll, the money attempted to be reclaimed in this action. * * *

If the defendant was not entitled to boomage, it is, secondly, contended that the payment, being voluntary, cannot be reclaimed. Upon this point, there is not an entire harmony in the decided cases. It is believed, however, that by attending to certain distinctions, which have sometimes not been adverted to, they may be in a great measure reconciled.

It has been often held that money paid with a full knowledge of all the facts, although under a mistake of the law, cannot be recovered back. Thus in cases of insurance, where there has been no fraud, and the party paying is fully apprized of the facts, although under a misapprehension of his legal liability, he can sustain no action for the money thus paid. Lowrie v. Bourdieu, Doug. 471, per Buller, J.; Bilbie v. Lumley, 2 East, 469; Herbert v. Champion, 1 Campb. 134. The same principle applies, where indorsers of notes of hand or bills of ex-

[26] A portion of the opinion, holding that under the circumstances of the case the defendant had no legal right to claim toll from plaintiff, is omitted.

change, pay under a mistake of the law, but with a knowledge of the facts. In Brisbane v. Dacres, 5 Taunt. 144, the captain of a ship of war had paid money to his admiral, in conformity with a usage which had obtained, but to which he was not by law entitled, but he was not permitted to recover it again; there being nothing against conscience in retaining the money. In that case, Chambre, J., who dissented from his brethren, does not accede to the principle that money, paid under a mistake of the law, cannot be recovered. But Gibbs, J., says: "I think that where a man demands money of another as a matter of right, and that other, with a full knowledge of the facts upon which the demand is founded, has paid a sum, he can never recover back the sum he has so voluntarily paid."

This position is broad enough to sustain the objection taken by the defendant. There are other cases where, to avoid or close a suit threatened or commenced, a party voluntarily paying, whatever may be his legal liability, must abide by the adjustment he has made. Knibbs v. Hall, 1 Esp. 84; Brown v. McKinally, Id. 279; Cartwright v. Rowley, 2 Esp. 723. These cases illustrate and enforce the legal maxim, "Volenti non fit injuria."

But this rule applies where the party has a freedom in the exercise of his will, and is under no such duress or necessity as may give his payments the character of having been made upon compulsion. It has been laid down as a general principle, that an action for money had and received lies for money got through imposition, extortion, or oppression, or an undue advantage taken of the party's situation. Moses v. McFarlane, 2 Burr. 1005; Smith v. Bromley, cited in Doug. 696. In Astley v. Reynolds, 2 Strange, 916, an action was sustained to recover money, extorted by a pawnbroker for the redemption of plate, notwithstanding it was objected that the payment was voluntary. In Hall v. Shultz, 4 Johns. (N. Y.) 240, 4 Am. Dec. 270, Spencer, J., says this case has been overruled by Lord Kenyon in Knibbs v. Hall. There the plaintiff had paid, as he insisted, five guineas more rent than could have been rightfully claimed of him, to avoid a distress which was threatened. Lord Kenyon held this to be a voluntary payment, and not upon compulsion, as the party might have protected himself from a wrongful distress by replevin. His lordship does not advert to the case of Astley v. Reynolds; and subsequently, in Cartwright v. Rowley, before cited, he refers with approbation to an action within his recollection, for money had and received, brought against the steward of a manor, to recover money paid for producing at a trial some deeds and court rolls, for which he had charged extravagantly. It was urged that the payment was voluntary; but it appearing that the party could not do without the deeds, and that the money was paid through the urgency of the case, the action was sustained. Had the distress threatened in Knibbs v. Hall been actually made, money paid to relieve the goods could not have been recovered in assumpsit, upon a principle which will be subsequently noticed.

Hall v. Shultz, cited by the counsel for the defendant, was commented upon in Gilpatrick v. Sayward, 5 Greenl. 465. Neither of these actions could be sustained without a violation of the statute of frauds, and upon this ground they were defeated.

In Stevenson v. Mortimer, Cowper, 805, the plaintiff recovered in an action for money had and received, an excess of fees by him paid to a custom-house officer, to obtain a document he was under the necessity of procuring.

In Ripley v. Gelston, 9 Johns. (N. Y.) 201, 6 Am. Dec. 271, the plaintiff recovered in assumpsit of the collector of New York money illegally claimed by him as tonnage and light money, and which the plaintiff paid to obtain a clearance of his vessel. In Clinton v. Strong, 9 Johns. (N. Y.) 370, money was reclaimed, which had been wrongfully exacted by the clerk of the district court for the redelivery of property which had been seized. In the foregoing cases, the payments were not deemed voluntary, but extorted and compulsory.

It may be insisted that trespass or replevin would have been more appropriate remedies for the plaintiff. Either might doubtless have been maintained; and where there are specific remedies, provided by law for a peculiar class of injuries, assumpsit cannot be substituted. It was upon this ground that Lindon v. Hooper, Cowper, 414, was decided.[27] Cattle damage feasant had been wrongfully distrained, money had been paid for their liberation, and an action for money had and received brought to recover it. The action did not prevail. The court place their opinion expressly on the nature of the remedy by distress, which they say is singular, and depends upon a peculiar system of strict positive law; that the distrainor has a certain course prescribed to him which he must take care formally to pursue; and that the law has provided two precise remedies for the owner of the cattle which may happen to be wrongfully distrained, replevin, and, after paying the sum claimed, trespass, in which such payment must be specially averred and set forth as an aggravation of the trespass. Then are to follow pleadings, which put directly in issue the validity of the distress. From a case of this peculiar character, decided upon this special ground, no general principle can be extracted which can govern cases where the law of distress does not apply.

Irving v. Wilson, 4 D. & E. 485, is a case strongly resembling the one now before the court. A revenue officer had seized goods not liable to seizure, but demanded money for their release, which the owner paid. This was recovered back in an action for money had and received. It was held to be a payment not voluntary, but by coercion, the defendant having the plaintiff in his power, by stopping his goods. It does not

[27] In accord with Lindon v. Hooper (1776) are Knibbs v. Hall (1794) 1 Esp. 84, also discussed in the principal case, and Colell v. Peden (1834) 3 Watts (Pa.) 327. Contra: Quinnett v. Washington (1846) 10 Mo. 53. See, also, Green v. Duckett (1883) 11 Q. B. D. 275.

appear to have occurred to the counsel or the court that it was a case which was affected by the decision in Lindon v. Hooper.

Trespass would have been an appropriate remedy for the unlawful seizure; but after payment, assumpsit was also appropriate. The money was extorted. The payment was not voluntary in any fair sense of that term, and the defendant had no just title to retain it. If money is voluntarily paid to close a transaction, without duress either of the person or goods, the legal maxim, "Volenti non fit injuria," may be allowed to operate. It would be a perversion of the maxim to apply it for the benefit of a party who had added extortion to unjustifiable force and violence.

The party injured often finds a convenience in being allowed to select one of several concurrent remedies. In the case under consideration, replevin would have restored the property unlawfully seized. But to procure a writ, and an officer to serve it, would have occasioned delay, which might have subjected the plaintiff to greater loss than the payment of the money demanded. Besides, he must have given a bond to the officer to prosecute his suit; and he might meet with difficulty in obtaining sufficient sureties. Had he brought trespass, several months might have elapsed before he could have obtained a final decision, and this delay might have been attended with serious inconvenience. By the course pursued, these difficulties were avoided. Nor is the defendant placed by it in any worse situation. He has been permitted to urge in his defence any claim of right under the corporation; and he is liable to pay only the money actually received by him, the plaintiff waiving, by the form of the action, damages for the illegal seizure.

We perceive no objection in principle to the form of the action, nor do we find it unsupported by precedent and authority. Exceptions overruled.[28]

[28] In Fargusson v. Winslow (1885) 34 Minn. 384, 25 N. W. 942, the plaintiff had chartered from the defendant a steam barge for the purpose of transporting grain through the Great Lakes from Duluth to Buffalo. Upon arrival of the vessel at its destination the defendant refused to deliver the cargo to the plaintiff until the latter should pay him $200, which sum defendant mistakenly, but in good faith, claimed as demurrage charges. Plaintiff, having already contracted for the sale of the grain, paid to the defendant under protest the sum claimed, in order to gain possession of his property. The court held that the money so paid could be recovered, saying: "When one, in order to recover possession of his personal property from another who unjustly detains it, is compelled to pay money which is demanded as a condition of delivery, such payment, when made under protest, is deemed to have been made compulsorily or under duress, and may be recovered back,—at least when such detention is attended with circumstances of hardship or of serious inconvenience to the owner."

In Bates v. N. Y. Life Insurance Co. (1802) 3 Johns. Cas. (N. Y.) 238, it was held that a refusal of a corporation to transfer certain shares on its books unless the buyer of the shares paid a debt from the seller to the corporation was such duress as to entitle the buyer to recover the amount paid. But see De la Cuesta v. Insurance Co. (1890) 136 Pa. 62, 82, 658, 20 Atl. 505, 9 L. R. A. 631.

WESTLAKE & BUTTON v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, 1882. 77 Mo. 47, 46 Am. Rep. 4.)

This action was brought by Westlake & Button, a corporation, to recover of the city of St. Louis the sum of $1,756.49, the aggregate of overcharges made by the city, as the plaintiff alleged, on water licenses issued to plaintiff. At the trial the plaintiff gave evidence tending to show that in September, 1862, the license for plaintiff's foundry was fixed at $115 per half year; that prior to that time it had been $42; that the new rate was illegal and excessive; that plaintiff objected to it on that ground; that the assessor and collector of water rates refused to make any reduction and threatened to turn off the water from plaintiff's foundry at once if payment was not made; that payment was made to prevent this threat being carried into execution; that like objection was made by plaintiff at each renewal of the license; that in 1873 application was made to the board of water commissioners for a reduction, but they refused relief; that plaintiff, thereupon, refused to pay the overcharge and the board sent down a man to turn off the water from plaintiff's premises; that when he came, in order to prevent the water from being turned off, plaintiff paid the license; that plaintiff's foundry was entirely dependent for its supply of water on the city waterworks, and that if the water had been turned off plaintiff would have been compelled to close their foundry and thus have suffered a heavy loss. It further appeared that the water never was, in point of fact, turned off; that none of plaintiff's property was ever seized, and none of plaintiff's officers or employés were ever arrested, nor was any threat of seizure or arrest ever made; that no written protest was ever filed by plaintiff; and that after 1873 the license was reduced to the original rate. This was the substance of the plaintiff's evidence. At its conclusion the court, at the request of the defendant, gave an instruction that the plaintiff could not recover. There was judgment for the defendant, which judgment was affirmed by the St. Louis court of appeals, and plaintiff then appealed to this court.

SHERWOOD, J. The instruction in the nature of a demurrer to the evidence should not have been given. The money sought to be recovered was not voluntarily paid. None of the three cases cited by the defendant are analogous to the present one. Two of them follow in the wake of, and were similar in their essential facts to that of Walker v. City of St. Louis, 15 Mo. 563. There the party who afterward complained, made no objection; paid the taxes; saw them applied to the improvement and enhancement of the value of the property on which they were levied, and years afterward, for the first time, is the complaint made. Of course this was a mere voluntary payment, and no right to recover any excess existed. But no such case is presented by the present record. Here the parties who paid, objected and protested from the first. They vainly called the attention of the officers appointed to assess

and collect the amount of the water license, to the fact that such amount was in excess of that allowed by the ordinance; they in vain appealed to the board of water commissioners. The only answer returned in each instance was, "pay, or we will turn off the water." It is easy to see that in such circumstances the payments were not made voluntarily. They were made under what has been aptly termed "moral duress;" the parties paying the excessive amount, and those receiving it, were not on equal terms. The city officials possessed the power, and they threatened to exercise it, of cutting off the water supply of Westlake & Button, unless the illegal demands already mentioned, met with immediate compliance. If this conditional threat had been carried into execution, the foundry of the applicants for license would have been forthwith closed, and from sixty to one hundred hands thrown out of employment. The payment of the excess was, therefore, as much under compulsion, as if the city officials had been armed with a warrant for the arrest of the person or the seizure of goods, in which case, but one opinion would be entertained as to the nature of the payment if made.

The case of Maguire v. State Savings Association, 62 Mo. 344, closely resembles, in its salient characteristics, and is decisive of this one. There the collector demanded interest on a personal property tax, an illegal demand, and this demand was coupled with another demand for the personal property tax itself, which was in all respects legal. The Savings Association objected to the payment of the excess, applied in vain to the county court for an abatement of the interest, and then paid the whole sum, and we held, in an action for money had and received, the excess could be recovered, because "the money was unwillingly and compulsively paid; paid to one seemingly clothed with power to seize and sell goods, etc., for the payment of the illegal demand, and paid under fear that such unjust demand would be enforced." If the fear of the seizure of goods in the one case would make the payment of the excess, when made under objection, an involuntary one, certainly a payment made to prevent immediate and incalculable injury to one's business or property, can be regarded in no other light.

And it is idle to say that a tender should have been made of the exact amount due. No such tender was made or deemed necessary in Maguire's case, supra, and besides, a tender of a smaller sum than that demanded, is never necessary where it is apparent from the language used, as in this case, that such tender would be a mere nugatory act, and be met with prompt and peremptory refusal to receive the amount if tendered. Hoyt v. Sprague, 61 Barb. (N. Y.) 497; Holmes v. Holmes, 12 Barb. (N. Y.) 137; Deichmann v. Deichmann, 49 Mo. 107.

Therefore judgment reversed and cause remanded.[29]

[29] Accord: Chicago v. N. W. Mutual Ins. Co. (1905) 218 Ill. 40, 75 N. E. 803; Panton v. Duluth Gas & Water Co. (1892) 50 Minn. 175, 52 N. W. 527, 36 Am. St. Rep. 635.

In Lehigh Coal & Navigation Co. v. Brown (1882) 100 Pa. 338, the plaintiff in error (the defendant below) had, pursuant to statutory authority, constructed a dam upon the Lehigh river, the backwater from which formed a

NIEDERMEYER v. UNIVERSITY OF MISSOURI.

(Kansas City Court of Appeals, 1895. 61 Mo. App. 654.)

Appeal from the Boone County Circuit Court; John A. Hockaday, Judge.

SMITH, P. J.[30] The catalogue of the University of the State for the years 1891 and 1892 contains the following paragraph, amongst others:

"*Tuition Charges and Expenses.*—Applicants for admission to any of the classes of the law department, or as special students of elective courses, are required to pay the sum of fifty dollars for the first year's attendance and forty dollars for each successive year.

"[Signed] Alexander Martin, Dean, Columbia, Mo."

It appears that the plaintiff examined the said catalogue, including the above quoted paragraph, after which he concluded to enter the University with the view of availing himself of the entire course of legal study there specified. Accordingly, in October, 1892, he paid the treasurer of the University the sum of $50 and was admitted to the junior class of the law department for the year ending June, 1893.

In September, 1893, the plaintiff, desiring admission to the senior class of said law department for the session ending June, 1894, offered to pay said treasurer $40 tuition for that year, which offer was rejected, and finding that the sole condition of admission was the prepayment of a tuition fee of $50, he paid that amount under protest, and was thereupon given a matriculation card. In the catalogue of 1893 and 1894 is a paragraph to the effect that law students are required to pay

pool on which the plaintiff's sawmill was located. The defendant company from time to time collected from the plaintiff certain illegal tolls, by wrongfully threatening to draw off the water in the pool and thus prevent the plaintiffs from getting their logs to the mill. The court, in holding that the plaintiff could recover the money so collected, said: "According to the finding of the jury in the case before us, there was a threatened exercise of power possessed by the company which, if it had been carried into execution, would have practically ruined the business of the plaintiffs below. The jury has found that the threat, repeated from time to time, had the effect of coercing payment of the tolls. The plaintiffs below had no other means of immediate relief. They were compelled either to submit to the unlawful demand of the company or run the risk of having their business practically destroyed or seriously interrupted."

In Guetzkow Bros. Co. v. Breese (1897) 96 Wis. 591, 72 N. W. 45, 65 Am. St. Rep. 83, the plaintiff was a lessee of the defendants, and pursuant to the terms of the lease had taken out insurance policies payable to the lessors and the lessee as their interests might appear. After a fire the defendants refused to execute proofs of loss, without which the lessee could not collect the insurance money, unless the plaintiff would pay them a sum of money which was not in fact owing. The court held that the plaintiff could recover the sums so exacted, saying: "The plaintiff was in a position where it must obtain its insurance money at once in order to go on with its business and fulfill valuable outstanding contracts, or it would suffer great loss. Under these circumstances it submitted under protest to the unjust demand in order to obtain its own money from the insurance company. This makes a case of legal duress of goods."

[30] A portion of the opinion is omitted.

$50 tuition per year. On substantially the foregoing state of facts, the plaintiff brought this suit before a justice of the peace to recover $10 for "excessive tuition collected for law department, 1893 and 1894." There was a trial in the court below, where the cause was removed by appeal, which resulted in judgment for the defendant, from which plaintiff has appealed.

The paragraph in the catalogue of 1892 and 1893 was, by its very terms, a public offer to admit persons as students to any of the classes of the law department of the University, on payment of the sum of $50 for the first year and $40 for each successive year. The plaintiff's payment of $50 and receipt of his matriculation card for the years 1892 and 1893, constituted an implied acceptance and also notice of such acceptance. The contractual relations created between the parties thus became complete and binding. Society v. Brumfiel, 102 Ind. 146, 1 N. E. 382, 52 Am. Rep. 657; Bishop on Contracts, § 322; Wharton on Contracts, § 241; Lovejoy v. Railroad, 53 Mo. App. 386. * * *

Although in the present case the payment of the excess was not made to preserve the inviolability of the person, or to redeem property illegally held, or to prevent its unlawful seizure, yet it was made to secure admission. It was paid to remove what was otherwise an insurmountable barrier to the completion of plaintiff's legal education in the University of his state; to avoid being compelled to go abroad to seek University advantages, amply provided by his own state for all its citizens; to enable plaintiff to gain admission to the senior class of the law department and thus speedily obtain his degree; and to prevent an interference and break in the course of his legal education, and the loss of money expended in reaching the University and providing textbooks, etc. The plaintiff and defendants were not on equal terms. The defendants possessed, and in fact threatened to exercise, the power of excluding the plaintiff unless the illegal demand of their treasurer met with compliance.

Under these circumstances, can it be said the payment was voluntary? Was it not under moral duress? Was not the plaintiff under as much compulsion as if the defendants had been armed with a warrant for the arrest of plaintiff or the seizure of his goods? If the fear of the seizure of goods, as in Maguire v. Savings Ass'n, 62 Mo. 344, would make the payment of the extorsive excess, if made under objection, compulsive and involuntary, it would seem that a payment made to prevent the incalculable injury already indicated must be regarded in the same light. According to some of the authorities within and without this state, from which we have quoted, the plaintiff's action can not be maintained; but according to the most recent rulings of the supreme court just referred to, it would appear that it can.

After the proposition contained in the catalogue of 1892 and 1893 had been accepted by plaintiff, and the rights of the plaintiff had thereby become fixed, it was not within the power of the defendants to alter or abridge those rights by withdrawing the proposition and publishing

that contained in the catalogue of 1893 and 1894. And whether plaintiff had notice of that fact before he applied for admission to the second year's course or not, it seems to us, can make no difference. The proposition contained in the catalogue of 1892 and 1893 was that of the state, and, when accepted, good faith and fair dealing required it should be carried out on the part of the state to the letter. An enlightened and progressive state can ill afford to trifle with the rights of the citizen in the slightest degree. The court erred in rejecting the theory contained in the plaintiff's instruction and in adopting that contained in those of the defendants.

The judgment must be reversed and cause remanded, with directions to the circuit court to enter judgment for the plaintiff. All concur.

STEELE v. WILLIAMS.

(Court of Exchequer, 1853. 8 Exch. 624.)

Action for money had and received for the use of the plaintiff. Plea, never indebted.

At the trial, before the Judge of the Sheriff's Court of London, it appeared that the action was brought by the plaintiff, an attorney, to recover from the defendant, who was the parish clerk of St. Mary, Newington, the sum of £4. 7s. 6d., paid by the plaintiff's clerk to the defendant, for fees claimed in respect of searches made and extracts taken from the Register Book of Burials and Baptisms in that parish. The plaintiff's clerk applied at the defendant's house, where the registers were kept, for permission to search them. He told the defendant that he did not want certificates, but only to make extracts. The defendant said, the charge would be the same, whether he made extracts or had certificates. The plaintiff's clerk searched through four years, was engaged two hours, and took twenty-five extracts, namely, twelve burials and thirteen baptisms. He inquired of the defendant what was his charge, and the defendant replied 3s. 6d. for each extract, amounting in the whole to £4. 7s. 6d., which the plaintiff's clerk then paid.

The plaintiff promptly demanded that defendant return the sum so paid, less the usual charge for searches. On the defendant's refusal, this action was brought.

It was submitted, on the part of the defendant, first, that the defendant was not the proper party to be sued, but the action should have been against the rector; secondly, that the claim was not illegal; and thirdly, that the payment was voluntary. It being, however, agreed on both sides, that the question was one of law for the decision of the judge,[31] he decided that the payment was voluntary, and directed a ver-

[31] The question as to whether payments were voluntarily made when the facts are undisputed was held to be a question of law for the court in Eslow v. City of Albion (1908) 153 Mich. 720, 117 N. W. 328, 22 L. R. A. (N. S.) 872,

dict for the defendant, reserving leave for the plaintiff to move to enter a verdict for £4. 7s. 6d., or any smaller sum, if the Court should be of opinion that the defendant was the proper party to be sued, that the demand was illegal, and the payment not voluntary.

Willes, obtained a rule nisi accordingly.

PLATT, B.[32] I am also of opinion that the verdict ought to be entered for the plaintiff. Under the 6 & 7 Will. IV, c. 86, s. 35, there are only two things in respect of which the incumbent is entitled to fees, namely, for a search and for a certified copy of the register. A fee of 1s. is allowed for a search throughout the whole period of the first year, and 1s. 6d. for every additional year. Those are all the fees demandable in respect of a search. With regard to taking extracts, no fee is mentioned, and the incumbent has no right to tax any one for so doing. But inasmuch as before the search began the defendant told the plaintiff's clerk that the charge would be the same whether he made extracts or had certified copies, and under that pressure the extracts were obtained, and it would have been most dishonourable for the party, after having got the extracts, to refuse to pay, the money so obtained may be recovered back. The defendant took it at his peril; he was a public officer, and ought to have been careful that the sum demanded did not exceed the legal fee. As to the defendant being the proper person to be sued, it is almost useless to make any observation. He was not justified in taking the money, and is responsible for his own illegal act.

Rule absolute to enter a verdict for the plaintiff for £3. 14s. 6d.[33]

following Betts v. Village of Reading (1892) 93 Mich. 77, 52 N. W. 940. But in Wooley v. Chicago & N. W. Ry. (1912) 150 Wis. 183, 136 N. W. 616, and Link v. Aiple-Hemmelmann Real Estate Co. (1914) 182 Mo. App. 531, 165 S. W. 832, this was held to be a question for the jury.

[32] The statement of facts is abridged and the concurring opinions of Parke and Martin, BB., are omitted.

[33] In Clinton v. Strong (1812) 9 Johns. (N. Y.) 370, a vessel owned by the plaintiffs had been wrongfully detained for the violation of the nonintercourse act of 1810, and upon proof that the case was within certain exceptions to the act it was released, but only upon the payment of costs to the defendant, the United States marshal, which payment was unlawfully exacted. This action was brought to recover the sum so paid. The court said: "The payment of the costs could not be considered a voluntary act. They were exacted by the officer, colore officii, as a condition to the redelivery of the property. It would lead to the grossest abuse to hold a payment made under such circumstances a voluntary payment, precluding the party from contesting it afterwards."

In Ogden v. Maxwell (1855) 3 Blatchf. 319, Fed. Cas. No. 10,458, where plaintiffs had been required to pay to defendant, as collector of the port of New York, a sum larger than was authorized by the statute, for a permit to land the baggage of passengers from their vessel, the court pointed out that: "It is not necessary, to the maintenance of a civil action for the recovery of money wrongfully collected, that any turpitude should be proved against the officer. The suit in no way rests on any illegal purpose of the defendant in enacting the payment. It is well sustained, if his official power was exercised in the collection, without warrant of law."

In Sheibley v. Cooper (1907) 79 Neb. 232, 112 N. W. 363, it was held that the payment of excessive fees to a former clerk of court after his term of

MEARKLE v. HENNEPIN COUNTY.

(Supreme Court of Minnesota, 1890. 44 Minn. 546, 47 N. W. 165.)

Appeal by defendant from an order of the district court for Hennepin County, Young, J., presiding, overruling a demurrer to the complaint.

DICKINSON, J. This action is for the recovery of the sum of $5,000, which the plaintiffs, as the executors of the will of Thomas A. Harrison, paid to the treasurer of Hennepin county, in March, 1888, pursuant to the statute, (chapter 103, Laws 1885,) and which, by the terms of the law, was required to be so paid as a condition precedent to the exercise of the jurisdiction of the probate court in the settlement of the estate. The provisions of that law are more fully set forth in our decision in State v. Gorman, 40 Minn. 232, 41 N. W. 948, 2 L. R. A. 701, in which the statute was held to be unconstitutional. This appeal is from an order overruling a demurrer to the complaint, and the question to be decided is whether, the law requiring such payment to be made being unconstitutional, the money paid under the circumstances stated in the complaint may be recovered by action.

The circumstances connected with the payment were as follows: The deceased was a resident of Hennepin county at the time of his death. His will was duly proved in the probate court of that county, and these plaintiffs became the qualified executors of it. An appraisal of the estate was made in accordance with the law, which showed that there was personal property belonging to the estate of the value of $897,058.79, and real property of the value of $383,600. Upon the return and filing of the inventory in probate court, the judge of that court, pursuant to the provisions of the statute, refused to allow the further administration of the estate to proceed, without the payment into the county treasury of the sum of $5,000, although the plaintiffs formally petitioned the court for the allowance of further proceedings, and sought an order for creditors to produce and file their claims. The payment was then made under a formal protest in writing wherein the executors set forth the refusal of the probate court to allow such proceedings for the settlement of the estate except upon the condition precedent that such payment be made, and wherein they protested against such requirement on the ground that the statute was unconstitutional and void. Included in the personal property of the estate, was a large amount of commercial paper, bonds, and stocks which required immediate attention on the part of the executors, and any delay in the settlement of the estate would have been of great detriment to the estate; and, in order to properly manage and protect the estate as

office had expired was a voluntary payment. "It was not a case of official extortion or oppression, but an ordinary transaction between two men dealing on equal terms."

is alleged, the plaintiffs were compelled to and did make the payment.

The facts being as above set forth, we consider that the right to recover the money, the payment of which was thus illegally exacted, has been determined by the decisions which we have heretofore made. State v. Gorman, supra; State v. Nelson, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300, and cases cited. The latter case cannot be distinguished in principle from this, and the reasons and authorities upon which that decision was made are so fully applicable to the question now before us that we refer to that opinion as expressing what we deem to be the law, in accordance with which this case must be decided.

But little more need be added. The necessity for going on with the legally prescribed proceedings in the probate court for the administration, care, and settlement of this very large estate is apparent from the facts stated. The court, whose jurisdiction was exclusive, refused to exercise the necessary jurisdiction, acting in compliance with the express requirement of the statute. The court decided that the statute must be complied with, and no appeal would lie from the order of the court denying the petition of the plaintiffs. No course was left to the executors but to pay the tax, as required by the statute and by the order of the probate court, or to seek by mandamus proceedings, if that would have been a proper remedy, to secure a further adjudication as to the constitutionality of the law. But, if the latter course were pursued, the proceedings for the administration of the estate would have remained in suspense until a final adjudication could be had; and, in view of the facts that the payment was exacted by a statute law which had been in force and had been observed for several years; that the court having exclusive jurisdiction in this matter, decided the law to be constitutional; that the plaintiffs could not know that the law was invalid, or that it would be so declared to be by this court; of the magnitude of the interests involved; and of the fact that the plaintiffs might well consider that they would be deemed culpable if they were to suffer the administration of this estate to be delayed,—we think that the payment is to be deemed so far compulsory upon them that, being made under protest, the money may be recovered as an illegal exaction and not voluntarily paid.

We decide against the appellant, without discussing it, the point that the plaintiffs ought not to recover, because this action was not commenced until two years had elapsed after the money was paid.

Order affirmed.[34]

[34] Accord: Cook County v. Fairbank (1906) 222 Ill. 578, 78 N. E. 895; Trower v. City and County of San Francisco (1907) 152 Cal. 479, 92 Pac. 1025, 15 L. R. A. (N. S.) 183.

HEISERMAN v. BURLINGTON, C. R. & N. RY. CO.

(Supreme Court of Iowa, 1884. 63 Iowa, 732, 18 N. W. 903.)

Action at law to recover certain sums paid by plaintiff to defendant for the transportation of grain upon defendant's railroad in excess of reasonable and just charges therefor. The cause was tried to the court without a jury, and judgment was rendered for defendant. Plaintiffs appeal.

BECK, J.[35] 1. The petition alleges that between the twenty-eighth day of August, 1877, and the fourth day of February, 1878, the plaintiffs delivered to defendant, for transportation upon its railroad from West Union to Postville, Cedar Rapids, and Burlington, all points within this state, certain large quantities of grain to be delivered to connecting lines of railroad for transportation to Milwaukee, in the state of Wisconsin; that no other railroad than defendant's reached West Union, and plaintiffs were therefore compelled to procure transportation upon it; and that defendant charged and exacted large sums in excess of reasonable and just charges for the transportation of the grain, which plaintiffs were compelled to pay. The number of shipments, the quantity of grain in each, the charges paid, and the sums paid in each instance in excess of reasonable charges, and other particulars, are shown by an exhibit to the petition, which need not be more particularly noticed.

As defenses to the action, defendant alleges—* * * Second, that plaintiffs "knowingly, voluntarily, and willingly" paid the charges now claimed by them to be excessive and unreasonable; and, third, that the action is barred by the statute of limitations. * * *

3. It will be observed that this action is not brought to recover the penalties for overcharges by the railroad companies, provided by chapter 68, Acts Fifteenth General Assembly, in force when the acts complained of by plaintiffs were done. The plaintiffs seek to recover the sums paid by them in excess of reasonable charges, and nothing more. The liability of defendant for money collected for the transportation of property, in excess of reasonable charges, existed at common law. The enactment of a statute imposing penalties for excessive charges, recoverable by the party injured, or providing that for exacting and collecting them the agent of the railroad company shall be guilty of a misdemeanor, does not take away the right existing at common law to recover money paid in excess of reasonable charges. See City of Dubuque v. Ill. Cent. Ry. Co., 39 Iowa, 56; City of Burlington v. B. & N. Ry. Co., 41 Iowa, 134; Crittenden v. Wilson, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462; Gooch v. Stephenson, 13 Me. 371; Candee v. Hayward, 37 N. Y. 653. The injured party may waive the tort created by statute and sue upon the implied contract raised by the law, where-

[35] Only so much of the opinion as deals with the second and third defenses is printed.

by the carrier is obliged to repay to the consignee or consignor of the property all sums exacted in excess of reasonable compensation. Nor need the plaintiff, in a case brought to enforce such an obligation, show objection or protest prior to the payment made in excess of a reasonable compensation.

These rules are founded upon the consideration that railroad companies are public carriers, and those who employ them are in their power, and must bow to the rod of authority which they hold over consignors and consignees of property transported by them. If the consignor refuses to pay or contract to pay the charges fixed by the railroad company, his goods will not be carried; or, if the consignee refuses to make the payment demanded, the goods will not be delivered. In both cases great loss and even destruction of profitable business will result. If railroad companies should be held free from liability for excessive charges, the whole business of the country would be subject to unjust exactions resulting in oppression to citizens, and destructive to useful and profitable business. The law does not require objection or protest to the payment of unjust charges, for the reason that they would be vain, being addressed to those who occupy the commanding position of power to enforce obedience to their requirements.

For another reason they are not required. Those who do business with railroads never come in contact with the officers who possess authority to fix or abate rates of charges; indeed, they usually hardly know their names, or where to find them. Their places of business are usually in cities distant from points where much of the property is received for transportation. If the consignee should be required to make objection or protest to these officers, delays would follow, resulting in loss; and, in the case of the shipment of some kinds of perishable property, in its decay. These considerations take the case from the operation of the familiar rule which forbids recovery on account of payments voluntarily made without objection or protest. This rule does not apply to cases of compulsory payments, and does not require objection and protest where they would be unavailing and vain.[36] The doctrines we have expressed are supported by the following authorities: Chicago & A. Ry. Co. v. Coal Co., 79 Ill. 121; Mobile & M. Ry. Co. v. Steiner, 61 Ala. 559; Parker v. G. W. Ry. Co., 7 Man. & G. 253; Harmony v. Bingham, 12 N. Y. 99, 62 Am. Dec. 142; Chandler v. Sanger, 114 Mass. 364, 19 Am. Rep. 367; Stephan v. Daniels, 27 Ohio St. 527; Robinson v. Ezzell, 72 N. C. 231; Carew v. Rutherford, 106

[36] In De Graff v. County of Ramsey (1891) 46 Minn. 319, 48 N. W. 1135, the plaintiff, an executor, paid $1,000 into the county treasury pursuant to the requirements of a statute subsequently held unconstitutional. No protest was made at the time. It was held a voluntary payment. The court said: "We do not mean to say that in a clear case of coercion or duress a protest is necessary, or that it would be sufficient without circumstances of coercion; but if there be doubt, under the circumstances, that the payment is voluntary, it may be taken into account in determining the question that the payor declared as a part of his act that he paid involuntarily."

Mass. 1, 8 Am. Rep. 287; Lafayette & I. Ry. Co. v. Pattison, 41 Ind. 312; Philanthropic Building Ass'n v. McKnight, 35 Pa. 470; Wood v. Lake, 13 Wis. 84; Wheaton v. Hibbard, 20 Johns. (N. Y.) 290, 11 Am. Dec. 284; Thomas v. Shoemaker, 6 Watts & S. (Pa.) 179; Palmer v. Lord, 6 Johns. Ch. (N. Y.) 95; State Bank v. Ensminger, 7 Blackf. (Ind.) 105.

4. The action, as we have shown, is not brought to recover the penalty provided by statute, which is barred by the statute of limitations in two years. Herriman v. B., C. R. & N. Ry. Co., 57 Iowa, 187, 9 N. W. 378, 10 N. W. 340. Being an action to recover upon an implied contract, it is not barred until the expiration of five years. * * *

The judgment of the circuit court is reversed, and the cause will be remanded for proceedings in harmony with this opinion.[37]

SMITHWICK v. WHITLEY.

(Supreme Court of North Carolina, 1910. 152 N. C. 369, 67 S. E. 913.)

Appeal from Ward, J., of Beaufort.

Civil action to recover $280 alleged to have been paid under duress. The facts are as follows:

On December 3, 1900, plaintiff made a contract with defendants to purchase a piece of land containing 13.82 acres, for $483.72, and to give in payment ten notes of $46.99 each, one to be paid annually, secured by a mortgage on the land, and the balance in cash. The plaintiff alleges and proves that said notes and mortgage were delivered to defendant, and the bargain consummated at that time (the mortgage and notes being executed about a month thereafter and delivered to defendant; and the deed bearing date December 31, 1900, with acknowledgment of grantor on January 15, 1901, being left with defendant to be registered). The plaintiff went into possession of the land and began clearing it. Defendant denies that the deal was consummated, or that the notes and mortgage were left with him. The deed had not been turned over to plaintiff. Some time in February, 1904, defendant notified plaintiff that his deal on the swamp land was off. On March 4,

[37] Where the payment of the excessive charges is made after the receipt of the goods by the consignee, there is no duress, and payments so made are not recoverable. Kenneth & Gibson v. Railroad Co. (1868) 15 Rich. (S. C.) 284, 98 Am. Dec. 382; Knudsen-Ferguson Fruit Co. v. C., St. P., M. & O. Ry. Co. (1906) 149 Fed. 973, 79 C. C. A. 483.

See also Brown v. Worthington (1911) 152 Mo. App. 351, 133 S. W. 93.

In Peters v. Railroad Co. (1884) 42 Ohio St. 275, 51 Am. Rep. 814, the plaintiff, a shipper, although making his payments of freight charges after he had received the goods, was obliged to pay excessive charges in order to obtain the transportation of other goods. Held a payment under compulsion (an able opinion, discussing at length many important decisions). Accord: Transportation Co. v. Sweetzer (1885) 25 W. Va. 434. See also Knee v. Yankee Waist Co. (1915), 167 App. Div. 753, 153 N. Y. Supp. 56.

1904, plaintiff went to see defendant, and defendant said, if he (plaintiff) would make it $50 an acre, he would give him (plaintiff) the deed. The price agreed on in December, 1900, and the consideration named in the deed, having been $35.00 per acre. After considerable talk, plaintiff agreed to pay the price demanded rather than lose the land he had been working on for three years. He had ditched it, fenced it, and got it in tillable condition. He paid $275, the amount demanded, and defendant gave him his deed dated December 31, 1900.

Upon an intimation by the court as to the charge, plaintiff submitted to a nonsuit and appealed.

BROWN, J. We agree with his honor that the cause of action upon plaintiff's own evidence is barred by the statute of limitations, assuming that a cause of action had been made out; but no cause of action for duress is made out in the evidence or stated in the complaint.

The payment of the $280 in order to get a deed for the land was voluntary. The plaintiff had a right to stand on his legal rights in the land if he had any, and assert his equities in the courts of the state.

Duress exists where one by the unlawful act of another is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will. 14 Cyc. 1123, and cases cited; Bank v. Logan, 99 Ga. 291, 25 S. E. 692; Matthews v. Smith, 67 N. C. 374; Miller v. Miller, 68 Pa. 486.

Duress is commonly said to be of the person where it is manifested by imprisonment, or by threats, or by an exhibition of force which apparently cannot be resisted. Or it may be of the goods, when one is obliged to submit to an illegal exaction in order to obtain possession of his goods and chattels from one who has wrongfully taken them into possession. Astley v. Reynolds, 2 Strange, 915, is a leading case on this subject. Hackley v. Headley, 45 Mich. 573, 8 N. W. 511.

There is neither duress of the person or goods here. The plaintiff was in actual possession of the land, and the defendant denied his title, claiming that the "deal had not been consummated." In order to get a deed, plaintiff acceded to defendant's demand and paid the advanced price. Upon all the authorities, it was a voluntary payment, an adjustment of the dispute. No error.[38]

[38] No recovery may be had of a payment of money obtained by duress, if the same was actually due. The retention of such money is "not inequitable nor against good conscience." City of Chicago v. Malkan (1905) 119 Ill. App. 542.

As to duress of real property, see Joannin v. Ogilive, infra, page 540.

SECTION 3.—COMPULSION THROUGH LEGAL PROCEEDINGS

BROWN v. McKINALLY.

(Nisi Prius, before Lord Kenyon, C. J., 1795. 1 Esp. 279.)

This case is printed at page 64, supra.[39]

DICKERMAN v. LORD.

(Supreme Court of Iowa, 1866. 21 Iowa, 338, 89 Am. Dec. 579.)

Appeal from Winneshiek District Court.

The present action was commenced in the Winneshiek District Court by attachment against the defendants as non-residents of the State.

The plaintiff was a resident of Decorah, in this State, and the defendants of Chicago, where they are engaged in business as wholesale druggists.

It is admitted that, in June and July, 1863, plaintiff purchased merchandise of the defendant to the amount of $458.97. It is also admitted that, in July and September, 1863, payments were made by plaintiff to the amount of $284.06, leaving a balance due defendants of $174.91.

This balance ($174.91), the plaintiff claims he paid to defendants, in October, 1863, at their store in Chicago, but says that, if he took a receipt, it is lost. Of this payment, plaintiff produced no evidence except his own oath. Both defendants positively deny that any such payment was made to them by the plaintiff. Several circumstances, not very conclusive, were relied upon by the parties to fortify their respective claims, as regards this disputed payment; but these, as the opinion does not turn upon the weight of evidence, need not be specially detailed. In May, 1865, the present defendants commenced an action against the present plaintiff in Chicago by attachment, and garnished certain moneys which plaintiff had on deposit in one of the banks in that city. On the next day after the attachment was served, the parties had an interview, plaintiff claiming that he had paid the

[39] In Moore v. Vestry of Fulham, [1895] 1 Q. B. D. 399, the defendants issued a summons against the plaintiff under the Metropolis Management Acts, to recover his proportion of certain street improvement expenses alleged to be due from him as the owner of premises abutting on a street in the district of the defendants. The plaintiff, in the mistaken belief that his property abutted upon the street, paid the money before the summons was heard, and the summons was withdrawn. The plaintiff having discovered his mistake, brought an action to recover from the defendants the amount paid by him. Held that the money, having been paid under compulsion of legal process, could not be recovered back.

money in October, 1863, and the defendants denying it. The matter was arranged by the plaintiff paying the principal of the account claimed to be due by the defendants, the latter throwing off the interest. Plaintiff claims that he notified them at the time of payment that he should get it back if he could; the defendants, on the other hand, claiming, and one of them testifying, that after the explanations which were made to him, "the plaintiff appeared satisfied with the arrangement, and that it was all right, and that he had done wrong in not answering our communications, none of which had been replied to for over two years;" that the plaintiff "confessed that he thought defendants (Lord & Smith) were acting in good faith, and under the circumstances, they could not do otherwise than to try and enforce collection of their claim."

Under the testimony and instructions, the jury found a verdict for the plaintiff for $180, with six per cent. interest from May 12, 1865.

Motion for new trial being overruled, defendants excepted and appeal.

DILLON, J.[40] After stating the nature of the action, the court instructed the jury that "the first question for them to determine is, was the plaintiff indebted to defendants in the sum of $174.91, at the time defendants brought their attachment suit against plaintiff, as alleged?" The court, after alluding to the circumstances proper for the jury to consider in deciding this question, adds: "Weighing all the testimony and circumstances carefully, you will determine whether plaintiff had paid his account in full, to the defendants before the commencement of the said attachment suit. If you find he had paid the account in full, and afterward defendants brought suit by attachment and recovered it again, you will find for the plaintiff a verdict for the amount so paid by him. But if you find plaintiff had not paid the account of defendants before the attachment suit and the alleged second payment, you should find for defendants." The foregoing portion of the charge was not excepted to, but that which follows was excepted to by the defendants.

"Ordinarily," continues the court's charge, "if a man pays money on an account against him, the law presumes that he owes the same, and will not allow him to recover it again, unless paid by accident or mistake; but if he pays such account after being sued thereon, in a state foreign to his residence, by the extraordinary process of attachment, and to obtain a release of his property and under protest that the account is unjust because it has already been paid, it is paid under such legal compulsion that no presumption arises against the person so paying under protest."

There was no evidence tending to show actual fraud or intentional bad faith in either plaintiff or defendants.

[40] The statement of facts is abridged, and a portion of the opinion is omitted.

The jury must have found as a matter of fact, that the account had been paid by the plaintiff prior to the attachment suit. As an original question, the correctness of this finding is by no means clear, but the evidence on this point was conflicting, so much so, that we would not be warranted in interfering, upon this ground alone, with the verdict.

The judgment below must therefore stand, if the charge of the court above quoted, was, under the circumstances, correct.

Taking the charge together, and viewing it as the jury would doubtless view it, it laid down this principle of law, to wit: If an alleged debtor is sued in a State other than the one in which he resides, and his property is attached, this, without more, and even if the attachment suit is brought in good faith, will justify such alleged debtor, though he knew all the facts, in paying the amount claimed, and if he does so under protest, he may recover it back in the courts of his own State, if he can show that in point of fact the debt had before been paid, or was not just.

To this extent the law does not go. To justify recovering back money paid, when all the facts were known to the party paying, such payment must not have been simply an unwilling payment, but a compulsory one, and the compulsion must have been illegal, unjust or oppressive.[41]

Now, is it such a compulsion merely to sue a man by attachment in a State foreign to his residence? We think not. In this case the alleged debt was contracted in Illinois, and the admitted payments made on the account were paid in or sent to Chicago, and it would probably be fair to infer that the understanding of the parties was that payment should be made to defendants at the place where they extended the credit.

Let us test the principle laid down in the court's charge.

If I am sued in my own State, without attachment, and know the claim is unfounded and yet pay the money, I cannot recover it back although I may, at the time of payment, have said, I paid it under protest. And if I am sued by attachment, the result must be the same, if the attachment is the only circumstance relied upon to make the payment a compulsory one. And why? Because my adversary in either case, has made use of no unjust or illegal means to enforce his claim, or pretended claim against me. It is my duty to meet him in

[41] In Benson v. Monroe (1851) 7 Cush. (Mass.) 125, 54 Am. Dec. 716, the court, speaking through Metcalfe, J., said: "It is an established rule of law that if a party, with a full knowledge of the facts, voluntarily pays a demand unjustly made on him, and attempted to be enforced by legal proceedings, he cannot recover back the money as paid by compulsion, unless there be fraud in the party enforcing the claim and a knowledge that the claim is unjust. And the case is not altered by the fact that the party so paying protests that he shall bring an action to recover the money back. He has an opportunity in the first instance to contest the claim at law. He has, or may have, a day in court; he may plead and make proof that the claim on him is such as he is not bound to pay."

See, also, Turner v. Barber (1901) 66 N. J. Law, 496, 49 Atl. 676.

limine, and litigate and settle the question of my indebtedness. It is for this purpose that courts are instituted. I cannot pay the amount, and by simply saying, I do so under protest, afterward re-open the question. When one pays money on an alleged claim against him, he is forever concluded from saying he did not owe it, if he paid under no mistake of fact, and if the party receiving it made use of no illegal means to coerce the payment. Now, these principles of the law are not varied by the simple circumstance that one is sued in a State foreign to his residence. The defendants, by the law of Illinois, in which State they resided, and in which plaintiff contracted the account, had a right, if they could get jurisdiction, to sue the plaintiff in that State, and he being a non-resident, the laws of that State gave them a right to an attachment against his property found within the jurisdiction. In thus suing, therefore, they made use of no remedy which the law did not allow; and it will not do to hold that a payment, secured by none but the means provided by the law itself, is a compulsory or coerced one, there being no element of fraud or other ingredient of oppression in the case.

The plaintiff knew as well when he paid the money to the defendants, May 12, 1865, as he did a few days afterward, when he brought this suit to recover it back, that he did not owe it. He gained no new knowledge meantime; nor, indeed, any new evidence, such as a lost receipt for the amount. We must presume that the tribunals of our sister State would have fairly and correctly adjudicated the controversy between the parties. See how the principles asserted in the court's charge would work. Here is a dispute between parties residing in different States. One of the parties is found in Illinois, and the courts of that State acquire, in due form of law, jurisdiction over his property and his person. He says: "I will not go to trial here; I will pay under protest, and then sue in my own State to get back the amount." He does pay under protest, and returns to Iowa and sues the other party in that State by attachment. This party says, "I will not go to trial in Iowa, and I will also pay under protest, and afterward sue in my own State to get back the amount." A principle working such results cannot be well founded.

What we hold is, that the mere fact (there being no element of fraud or other means of oppression) that a party is sued by attachment in the State where the plaintiff resides, but which is foreign to the residence of the defendant, will not, without more, make the payment of money compulsory in such a sense that it can be recovered back, if paid under protest and if it can be shown not to be due.

We find, upon looking into the adjudicated cases, that the views above expressed are well sustained. * * *

The judgment below is reversed and the cause is remanded.

CHANDLER v. SANGER.

(Supreme Judicial Court of Massachusetts, 1874. 114 Mass. 364, 19 Am. Rep. 367.)

Contract for money had and received. At the trial in the Superior Court, before Rockwell, J., the plaintiff, in opening his case, stated that he expected to prove that the plaintiff was a dealer in ice, and furnished ice each week day to parties in Boston, under contracts to furnish a certain amount daily, upon all week days; that his custom was to have his carts loaded by twelve o'clock on Sunday night, in order to start early Monday morning; that any failure on the part of the plaintiff to furnish his customers with ice on Monday would be a great injury to him; that Monday morning, July 12, 1869, he had standing in his sheds at Brighton, adjoining his ice-house, five heavy two-horse teams loaded with ice, ready to start for Boston before light; that the defendant Sanger held his promissory note and had proved it against his estate in insolvency; that in the insolvency proceeding he had obtained his discharge; that the defendants knew these facts; that the defendant Sanger and the other defendant who was an attorney at law, brought an action on this promissory note, under circumstances which would satisfy the jury that the action was commenced and carried on by them fraudulently, with the purpose of extorting money from the plaintiff by duress, under color of legal process; that in pursuance of this purpose, they went about two o'clock on Monday morning with a writ in the hands of an officer and made an attachment of the carts, horses and harnesses; that the attorney at law, who had been with the officer in making the attachment, went to the plaintiff's house and informed him of the attachment, and told him that none of the property so attached could go to Boston unless the claim should first be settled by the payment of $300; that the plaintiff told the attorney that he did not owe anything, and said he would dissolve the attachment by giving a bond; that the attorney then told him that it would take three days to dissolve it, and that for that time the property would be held under it, and that his discharge in insolvency did not cut off the claim; that the plaintiff believed these statements, and being ignorant of the method of dissolving attachments and being in fear of great loss in his business, to relieve the property from attachment, he paid the $300 to the attorney under protest, stating that he should claim and enforce his rights, and recover back the money.

The presiding judge being of the opinion that these facts, if proved, would not sustain the action, so ruled; whereupon, by consent of the parties, he reported the case to this court for their decision. It was agreed that if the court should be of opinion that these facts, if proved, were sufficient to sustain the action, then it was to stand for trial; otherwise judgment was to be entered for the defendants.

GRAY, J. This is not an action of tort, to recover damages for malicious prosecution, or abuse of legal process, but an action of contract, in the nature of assumpsit, for money had and received by the defendants, which they have no legal or equitable right to retain as against the plaintiff. Although the process sued out for the defendant was in due form, yet if, as was offered to be proved at the trial, he fraudulently, and knowing that he had no just claim against the plaintiff, arrested his body or seized his goods thereon, for the purpose of extorting money from him, then, according to all the authorities, the payment of money by the plaintiff, in order to release himself or his goods from such fraudulent and wrongful detention, was not voluntary, but by compulsion; and the money so paid may be recovered back, without proof of such a termination of the former suit as would be necessary to maintain an action for malicious prosecution. Watkins v. Baird, 6 Mass. 506, 4 Am. Dec. 170; Shaw, C. J., in Preston v. Boston, 12 Pick. 7, 14; Benson v. Monroe, 7 Cush. 125, 131, 54 Am. Dec. 716; Carew v. Rutherford, 106 Mass. 1, 11 et seq., 8 Am. Rep. 287; Richardson v. Duncan, 3 N. H. 508; Sartwell v. Horton, 28 Vt. 370; Gibson, C. J., in Colwell v. Peden, 3 Watts (Pa.) 327, 328; Cadaval v. Collins, 4 A. & E. 858; s. c. 6 Nev. & Man. 324; Parke, B., in Oates v. Hudson, 6 Exch. 346, 348, and in Parker v. Bristol & Exeter Railway Co., Id. 702, 705.

New trial ordered.[42]

JOANNIN v. OGILVIE.

(Supreme Court of Minnesota, 1892. 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. Rep. 581.)

Appeal by plaintiffs, George Joannin and Christian O. Hansen, from a judgment of the District Court of St. Louis County, Stearns, J.

This action was brought upon a note for $497, and interest, dated May 1, 1891, payable to plaintiff's order fifteen days thereafter. It was made by defendant David Ogilvie, and indorsed for his accommodation by F. H. Barnard, the other defendant. The note was given for the debt of Ogilvie, and he delivered to plaintiffs, as security for its payment, thirty shares of the capital stock of the Northwestern Investment Company, worth $300, and two shares of the capital stock of the St. Louis Investment Company, worth $200.

By his answer, Ogilvie admitted his liability on the note, and stated that Barnard was his surety, and for counterclaim alleged that on January 31, 1890, he owned lots Nos. 93 and 95 in Block 47 in Duluth proper, and had erected buildings thereon; that he bought doors, sash, and other goods of one A. H. Thompson, a retail dealer, and paid him for them, and used them in the buildings. Thompson had

[42] Compare Weber v. Kirkendall (1894) 39 Neb. 193, 57 N. W. 1026.

previously purchased these goods with others from plaintiffs, the manufacturers, to sell again at retail to his customers. Thompson was indebted to plaintiffs on account for goods so bought of them, but Ogilvie did not know this.

On that day plaintiffs made and filed for record a lien statement, claiming to be due them from Thompson $682.50, and that he was a contractor with Ogilvie to furnish material for the buildings on the lots. This claim was incorrect and the lien invalid. Ogilvie was largely indebted, and pressed for money, and was negotiating for a loan of $15,000, to be secured by his mortgage on this real estate. The lenders refused to make the loan unless this lien was removed. Plaintiffs refused to discharge it of record unless Ogilvie paid Thompson's debt to them. He paid it under protest March 19, 1890, and in this action asked judgment against plaintiffs for the amount so paid, (after deducting the amount due them on the note) and for return of his stocks.

The action was tried September 24, 1890, without a jury. The court found the payment of Ogilvie to plaintiffs was made under duress, and directed judgment as prayed in his answer. It was so entered, and plaintiffs brought this appeal.

MITCHELL, J. The findings in this case are so specific as to constitute a sufficient statement of the facts, and an examination of the record satisfies us that, on all material points, they are fully justified by the evidence.

That plaintiffs' claim of a lien on the land of the defendant Ogilvie was wholly unfounded is conceded. Merriman v. Jones, 43 Minn. 29, 44 N. W. 526. Therefore the only question is whether the payment of the claim was voluntary, or whether it was made under such compulsion or constraint that it is to be deemed in law involuntary, so that the money may be recovered back.

In examining the authorities upon the question as to what pressure or constraint amounts to duress justifying the avoiding of contracts made, or the recovery back of money paid, under its influence, one is forcibly impressed with the extreme narrowness of the old common-law rule on the one hand, and with the great liberality of the equity rule on the other. At common law, "duress" meant only duress of the person, and nothing short of such duress, amounting to a reasonable apprehension of imminent danger to life, limb, or liberty, was sufficient to avoid a contract, or to enable a party to recover back money paid. But courts of equity would unhesitatingly set aside contracts whenever there was imposition or oppression, or whenever the extreme necessity of the party was such as to overcome his free agency. The courts of law, however, gradually extended the doctrine so as to recognize duress of property as a sort of moral duress, which might, equally with duress of the person, constitute a defense to a contract induced thereby, or entitle a party to recover back money paid under its influence. And the modern authorities generally hold that

such pressure or constraint as compels a man to go against his will, and virtually takes away his free agency, and destroys the power of refusing to comply with the unlawful demand of another, will constitute duress, irrespective of the manifestation or apprehension of physical force.

The rule is that money paid voluntarily, with full knowledge of the facts, cannot be recovered back. If a man chooses to give away his money, or to take his chances whether he is giving it away or not, he cannot afterwards change his mind; but it is open to him to show that he supposed the facts to be otherwise, or that he really had no choice. Poll. Cont. 556.

In Fargusson v. Winslow, 34 Minn. 384, 25 N. W. 942, this court held that "when one in order to recover possession of his personal property from another, who unjustly detains it, is compelled to pay money which is demanded as a condition of delivery, such payment, when made under protest, is deemed to have been made compulsorily or under duress, and may be recovered back, at least when such detention is attended with circumstances of hardship or of serious inconvenience to the owner." Again, in De Graff v. Ramsey Co., 46 Minn. 319, 48 N. W. 1135, it was said: "There is a class of cases where, although there be a legal remedy, a person's situation, or the situation of his property, is such that the legal remedy would not be adequate to protect him from irreparable prejudice; where the circumstances and the necessity to protect himself or his property otherwise than by resort to the legal remedy may operate as a stress or coercion upon him to comply with the illegal demand. In such cases, his act will be deemed to have been done under duress, and not of his free will." Fargusson v. Winslow, supra; State v. Nelson, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300; and Mearkle v. County of Hennepin, 44 Minn. 546, 47 N. W. 165,—are instances where the danger of irreparable or serious prejudice was considered so great and the legal remedy so inadequate as to practically leave the party no choice but to comply with the illegal demand, and hence to render the payment involuntary. It may be stated generally that whenever the demandant is in position to seize or detain the property of him against whom the claim is made without a resort to judicial proceedings, in which the party may plead, offer proof, and contest the validity of the claim, payment under protest, to recover or retain the property, will be considered as made under compulsion, and the money can be recovered back, at least where a failure to get or retain immediate possession and control of the property would be attended with serious loss or great inconvenience. Navigation Co. v. Tappan, 16 Blatchf. 297, Fed. Cas. No. 10,405.

As was said as long ago as Astley v. Reynolds, 2 Strange, 915, "plaintiff might have such an immediate want of his goods that an action of trover would not do his business. Where the rule volenti non fit injuria is applied, it must be when the party has his freedom

of exercising his will, which this man had not. We must take it he paid the money relying on his legal remedy to get it back again."

It has been said that, to constitute a payment under duress, "there must be some actual or threatened exercise of power possessed, or supposed to be possessed, by the party exacting or receiving the payment, over the person or property of the party making the payment, from which the latter has no other means of immediate relief than by advancing the money." Brumagim v. Tillinghast, 18 Cal. 265, 79 Am. Dec. 176; Radich v. Hutchins, 95 U. S. 210, 24 L. Ed. 409.

Beyond these and similar statements of general principles, the courts have not attempted to lay down any definite and exact rule of universal application by which to determine whether a payment is voluntary or involuntary. From the very nature of the subject, this cannot be done, as each case must depend somewhat upon its own peculiar facts. The real and ultimate fact to be determined in every case is whether or not the party really had a choice,—whether "he had his freedom of exercising his will." The courts, however, by a gradual process of judicial exclusion and inclusion, have arranged certain classes of cases on one or the other side of the line. For example, payment of an illegal tax, in order to prevent issuing a warrant of distress in the nature of an execution, and upon which the party has no day in court or opportunity to defend, is held not voluntary. Such were the cases of Board, etc., v. Parker, 7 Minn. 267, (Gil. 207,) and Preston v. Boston, 12 Pick. 7. So, also, the payment of an illegal demand in order to obtain possession of personal property detained otherwise than by judicial process, and where the immediate want of the property was so urgent that an action of replevin "would not do the owner's business." Such was the case of Fergusson v. Winslow, supra. Also the payment of an illegal tax in order to get a deed on record, as in the case of State v. Nelson, supra; or the payment of illegal fees in order to secure the exercise of its jurisdiction by the probate court in the administration and settlement of an estate, where the delay was liable to result in serious loss, as in the case of Mearkle v. County of Hennepin, supra.

On the other hand, it is well settled that the mere refusal of a party to pay a debt or to perform a contract is not duress, so as to avoid a contract procured by means of such refusal, although the other party was influenced in entering into it by his financial necessities. Such was the case of Cable v. Foley, 45 Minn. 421, 47 N. W. 1135; also Miller v. Miller, 68 Pa. 486; Hackley v. Headley, 45 Mich. 569, 8 N. W. 511; Goebel v. Linn, 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723; and Silliman v. U. S., 101 U. S. 465, 25 L. Ed. 987,—cited by plaintiff. It will be noted that in the last case referred to the party entered into the new contract, not for the purpose of obtaining possession of his property, (the barges,) but to secure payment of money due him from the government.

So, also, the fact that a lawsuit is threatened or property has been seized on legal process in judicial proceedings to enforce an illegal demand will not render its payment compulsory, at least in the absence of fraud on part of the demandant in resorting to legal process for the purpose of extorting payment of a claim which he knows to be unjust. The ground upon which this doctrine rests is that the party has an opportunity to plead and test the legality of the claim in the very proceedings in which his property is seized. Under this class fall the following cases cited by plaintiffs: Forbes v. Appleton, 5 Cush. 115; Benson v. Monroe, 7 Cush. 125, 54 Am. Dec. 716; Taylor v. Board of Health, 31 Pa. 73, 72 Am. Dec. 724; Navigation Co. v. Tappan, supra.

Also the payment of an illegal license to follow a particular business, where the party could not have been subjected to any penalties without judicial proceedings to enforce them, in which he would have an opportunity to contest the legality of the license, or where the license was exacted for a business the pursuit of which was not a natural right, but a mere privilege, which might be granted or withheld, at the option of the state. To this class belong the following cases cited by plaintiffs: Cook v. Boston, 9 Allen, 393; Emery v. Lowell, 127 Mass. 138; Mays v. Cincinnati, 1 Ohio St. 268; Custin v. City of Viroqua, 67 Wis. 314, 30 N. W. 515.

The same has been held as to money paid under threats of distress for rent, in the absence of fraud or any other fact, except that no rent was due. The theory seems to be that the party's remedy is to replevin, and try the question of liability at law. Such was the case of Colwell v. Peden, 3 Watts (Pa.) 327, also cited by plaintiffs.

But all these cases in which the payment was held voluntary are clearly distinguishable from the case at bar. The distinguishing and ruling fact in this case was the active interference of plaintiffs with defendant's property by filing the claim for a lien, which effectually prevented the defendant from using it for the purposes for which he had immediate and imperative need.

It was this active interference with the property, and not the necessitous financial condition of the defendant, which constituted the controlling fact. The latter was only one, and by no means the most important, of the circumstances in the case. Counsel for plaintiffs seems to assume that the filing of the claim for a lien was the commencement of a judicial proceeding for its enforcement, and therefore, within the doctrine of cases cited by him, that the subsequent payment of the claim was voluntary, because defendant might have interposed his defense in these proceedings. But this is clearly wrong. Filing a lien is in no sense the commencement of judicial proceedings. The only remedies open to defendant were either to commence a suit himself to determine the validity of plaintiffs' claim, or wait, perhaps a year, until the latter should commence a suit to enforce it. But with a large indebtedness hanging over him, an overdue mort-

gage on this very property upon which foreclosure was threatened, with no means to pay except money which he had arranged to borrow on a new mortgage which he had executed on this same property, $13,000 of which was withheld and could not be obtained until plaintiffs' claim of lien had been discharged of record, it is very evident that neither of the remedies suggested "would do defendant's business." He was so situated that he could neither go backward nor forward. He had practically no choice but to submit to plaintiffs' demand. Had it been goods and chattels which plaintiffs had withheld under like circumstances, there would be no doubt, under the doctrine of Fargusson v. Winslow, supra, but that the payment would be held to have been made under duress. But while filing the lien did not interfere with defendant's possession of the land, yet it as effectually deprived him of the use of it for the purposes for which he needed it as would withholding the possession of chattel property.

It has been sometimes said that there can be no such thing as duress with respect to real property, so as to render a payment of money on account of it involuntary. But this is not sustained by either principle or authority. In view of the immovable character of real property, duress with respect to it is not likely to occur as often as with respect to goods and chattels. But the question in all cases is, was the payment voluntary? and for the purpose of determining that question there is no difference whether the duress be of goods and chattels, or of real property, or of the person. Fraser v. Pendlebury, 31 Law J. C. P. 1; Pemberton v. Williams, 87 Ill. 15; Close v. Phipps, 7 Man. & G. 586; White v. Heylman, 34 Pa. 142; State v. Nelson, supra.

Considerable stress is placed upon defendant's silence and apparent acquiescence for a considerable time after he paid plaintiffs' claim. This might have some bearing upon the question whether the payment was voluntary or involuntary; but if it was in fact the latter, and a cause of action to recover back the money accrued to defendant, it would be neither waived nor barred by his subsequent silence or delay in asserting his right of action.

Judgment affirmed.[43]

[43] In First Nat. Bank v. Sargeant (1902) 65 Neb. 594, 91 N. W. 595, 59 L. R. A. 296, one Sargeant had conveyed certain land to a bank by deed absolute, as security. The bank thereafter claiming absolute ownership in the land, and denying Sargeant's equity therein, refused to consent to a sale thereof by Sargeant. Sargeant, being under necessity of raising money at once to meet certain obligations, paid a sum largely in excess of what was due the bank, in order to obtain a deed of the land so that he might complete the sale thereof. The court allowed a recovery of the amount of the overpayment, saying: "The duress complained of rests, we apprehend, in the unfortunate financial condition in which the plaintiff found himself, coupled with the control over the legal title to the land and apparent ownership thereof which the bank had acquired, and its power to prevent a voluntary disposal by the plaintiff to meet his just indebtedness without first obtaining the consent of the bank and complying with such demands as it might impose as a condition of releasing its interest and title to the property. The duress relied on as

VEREYCKEN v. VANDEN BROOKS.

(Supreme Court of Michigan, 1894. 102 Mich. 119, 60 N. W. 687.)

Error to circuit court, Bay county; Cobb, Judge.

Assumpsit by Frank Vereycken against Antoinette Vanden Brooks. There was a judgment for plaintiff, from which defendant brings error.

MONTGOMERY, J. This is an action brought to recover an alleged overpayment of interest upon a real-estate mortgage and note. April 14, 1879, plaintiff gave his promissory note to Antoinette Vanden Brooks of $460, with interest at 10 per cent. per annum, due in three years from its date. The note remained unpaid.

On the 2d of August, 1885, Vanden Brooks gave the plaintiff a written agreement, as follows: "I, Antoinette Vanden Brooks, agree to let Frank Vereycken have all the money at eight per cent. A. Vanden Brooks."

The note remained unpaid until September 18, 1891, when proceedings were instituted in the circuit court, in chancery, for the county of Bay, to foreclose the mortgage, and subpœnas were served on plaintiff. On the same day, the plaintiff paid the amount demanded, under protest, and brought this suit to recover the excess, which, if the agreement to reduce interest be valid, amounted to the sum recovered in the court below.

Two questions are presented by the record: First, whether the agreement to reduce the interest was based upon a sufficient consideration; and, second, whether the payment of the excess was, within the legal definition of the term, "involuntary."

We think the written memorandum may be well construed to be an open proposition to plaintiff to retain the money, at least until further demand, at the rate of 8 per cent., and that, when acted upon, the mortgagee cannot be permitted to exact a greater rate of interest.

A question of more difficulty is whether the payment was an involuntary payment. The general rule is that, to constitute a payment involuntary, it must be made under such circumstances as precludes the exercise of the free will of the payor. There must be either duress of the person or the property. Some courts have held that there can be no duress of real property which remains in the posses-

grounds of relief, if existing, consisted not so much in threats against the defendant or duress of his person as it did in a wrongful and unjust exercise of control and ownership of the property of the plaintiff, being the real estate to which it held the legal title, and apparently the right of disposal on any terms it saw fit to impose, or of withholding the land from sale altogether, until compelled to act by a final decree in a proper suit brought to try and determine the rights of the respective parties."

But see Hipp v. Crenshaw (1884) 64 Iowa, 404, 20 N. W. 492, holding that a payment of a judgment in order to relieve land of the lien thereof so that it might be mortgaged, was a voluntary payment.

sion of the payor, but most courts hold the contrary. State v. Nelson, 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300; Pemberton v. Williams, 87 Ill. 15; White v. Heylman, 34 Pa. 142; Joannin v. Ogilvie, 49 Minn. 564, 52 N. W. 217, 16 L. R. A. 376, 32 Am. St. Rep. 581. So it has been held that if the mortgagee of land require that the mortgagor pay more than is legally due, for the purpose of preventing a foreclosure by advertisement, this is such a compulsory payment as entitles the party to sue and recover back the excess.[44] But it is to be noted that in such a case the mortgagee, by his own act, unaided by any process of court, has it within his power to deprive the mortgagor of his title. Such was not the case here. All that the defendant had done was to file a bill to obtain a decree of the court fixing the amount due. Before any decree could pass against the present plaintiff, he was entitled to his day in court. Under these circumstances, we think that there was no duress of property such as the law recognizes. See Forbes v. Appleton, 5 Cush. 115; Benson v. Monroe, 7 Cush. 125, 54 Am. Dec. 716; Taylor v. Board, 31 Pa. 73, 72 Am. Dec. 724; Oceanic Steamship Co. v. Tappan, 16 Blatchf. 296, Fed. Cas. No. 10,405; Mariposa Co. v. Bowman, Deady, 228, Fed. Cas. No. 9,089.

It follows from these views that the judgment should be reversed, with costs.[45]

PRESTON v. CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts, 1831. 12 Pick. 7.)

Assumpsit to recover $711.50, money had and received to the use of the plaintiff, being the amount of a tax assessed upon him for the year 1828, for his poll and personal estate, and by him paid to the treasurer and collector of the city of Boston.

The plaintiff, a resident of Medford owning real property in Boston, was taxed by that city not only on such real estate, the taxes on which he paid without dispute, but also on his personal estate. He paid under protest the poll tax and the personal property tax to the treasurer and tax collector of Boston. The case was reserved for the Supreme Court.

SHAW, C. J.[46] * * * The only remaining question is, whether this money was paid voluntarily, or under duress. A party who has paid voluntarily under a claim of right, shall not afterwards recover back the money, although he protested at the time against his liability. The reason of this is obvious. The party making the demand, may know the means of proving it, which he may afterwards lose;

[44] Accord: McMurtrie v. Keenan (1872) 109 Mass. 185; Link v. Aiple-Hemmelmann Real Estate Co. (1914) 182 Mo. App. 531, 165 S. W. 832.

[45] Contra: Wessel v. Land Mortgage Co. (1893) 3 N. D. 160, 54 N. W. 922, 44 Am. St. Rep. 529.

[46] The statement of facts is abridged and a portion of the opinion is omitted.

and because another course, would put it in the power of the other party, to choose his own time and opportunity for commencing a suit. Brisbane v. Dacres, 5 Taunt. 143. But it is otherwise, when a party is compelled by duress of his person or goods to pay money for which he is not liable; it is not voluntary but compulsory, and he may rescue himself from such duress, by payment of the money, and afterwards on proof of the fact recover it back. Astley v. Reynolds, 2 Str. 916.

What shall constitute such duress, is often made a question. Threat of a distress for rent, is not such duress, because the party may replevy the goods distrained and try the question of liability at law. Knibbs v. Hall, 1 Esp. Rep. 84. Threat of legal process is not such duress, for the party may plead, and make proof, and show that he is not liable. Brown v. McKinally, 1 Esp. Rep. 279. But the warrant to a collector, under our statute for the assessment and collection of taxes, is in the nature of an execution, running against the person and property of the party, upon which he has no day in court, no opportunity to plead and offer proof, and have a judicial decision of the question of his liability. Where therefore a party not liable to taxation, is called on peremptorily to pay upon such a warrant, and he can save himself and his property in no other way than by paying the illegal demand, he may give notice, that he so pays it by duress and not voluntarily, and by showing that he is not liable, recover it back, as money had and received. Amesbury W. & C. Manuf. Co. v. Amesbury, 17 Mass. 461.

It appears by the facts agreed, that upon the first notice of the tax, the plaintiff applied to the treasurer and collector, setting forth his specific ground of objection, namely, that he was not an inhabitant and not liable to the tax on personal property. The plaintiff was informed by the collector, that he had no discretion on the subject, and unless he obtained an abatement, a warrant of distress would issue against him. He then applied to the city government, stated the grounds of his objection, and remonstrated against the tax; but they decided that the tax must be paid, of which the collector was duly informed. The law under which the treasurer and collector acted, obliged him to issue a warrant, under which the person and property of the plaintiff would have been liable to be taken, and that officer had notified him that such warrant would be issued. Under these circumstances the money was paid, and we think it cannot be considered as a voluntary payment, but a payment made under such circumstances of constraint and compulsion, and with such notice on his part, that it was so paid, that on showing that he was not liable he may recover it back, in this action, from the defendants, into whose treasury it has gone.

Defendants defaulted.[47]

[47] "There is considerable diversity of opinion on the subject of the recovery of moneys paid for taxes illegally assessed. The cases turn on the question whether in the particular circumstances of the case the payment was to be

regarded as voluntary or involuntary, some courts holding that unless a payment be made under an immediate or urgent necessity, i. e. to avoid an actual or threatened seizure or sale of one's goods, the payment is voluntary, and cannot be recovered even if made under protest. Others hold that when a warrant is in the hands of a collector which authorizes him to levy upon and sell the property of the delinquent taxpayer, such warrant being in the nature of an execution, and there being no means for testing the validity of the tax, a person illegally taxed may pay the tax under protest, and that the payment so made is not a voluntary payment in such sense as to prevent its recovery. * * * Payment to avoid the levy of a warrant already issued and in the hands of the collector, and just as sure to be levied, if the money is not paid, as night to follow day, is just as much a payment to preserve one's goods as though the levy had actually been threatened or made." Per Matteson, C. J., in Rumford Chemical Works v. Ray (1896) 19 R. I. 456, 34 Atl. 814.

Recovery of Illegal Taxes Paid under Duress.—A payment of an illegal tax or license fee, made after an actual arrest of the plaintiff, or a seizure of his goods, or after a threat of immediate arrest or seizure of goods, is deemed to be made under duress, and a recovery allowed. Lindsey v. Allen (1897) 19 R. I. 721, 36 Atl. 840; Douglas v. Kansas City (1898) 147 Mo. 428, 48 S. W. 851; Wheeler v. Plumas County (1906) 149 Cal. 782, 87 Pac. 802. Contra: Bean v. City of Middlesborough (1900) 57 S. W. 478, 22 Ky. Law Rep. 415.

It is generally held that if a warrant has issued to the knowledge of the plaintiff his payment is made under duress, even though there be no threat of immediate imprisonment or sale of his goods. Atwell v. Zeluff (1872) 26 Mich. 118; St. Anthony & Dakota Elevator Co. v. Bottineau County (1900) 9 N. D. 346, 83 N. W. 212, 50 L. R. A. 262; Rumford Chemical Works v. Ray, supra. Contra: Mayor v. Lefferman (1846) 4 Gill (Md.) 425, 45 Am. Dec. 145.

Where no warrant has been issued nor other measures taken to enforce collection, some courts hold that the payment is made under duress. Allen v. Burlington (1873) 45 Vt. 202; Kansas Pacific Railway Co. v. Commissioners (1876) 16 Kan. 587; Ottawa University v. Stratton (1911) 85 Kan. 246, 116 Pac. 892. ("The inevitableness of the result, unless forestalled by payment, is the matter of primary consequence rather than the nearness of the time when the tax proceeding will culminate.")

Other courts hold that there is no duress until some measures are taken to enforce collection. Railroad Co. v. Commissioners (1878) 98 U. S. 541, 25 L. Ed. 196 (compare Atchison, Topeka & Santa Fé Ry. Co. v. O'Connor [1911] 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050, cited infra); Raisler v. Mayor (1880) 66 Ala. 194; Morris v. City of New Haven (1906) 78 Conn. 673, 63 Atl. 123; Cincinnati, etc., R. Co. v. Hamilton County (1907) 120 Tenn. 1, 113 S. W. 361; Miner v. Clifton Township (1912) 30 S. D. 127, 137 N. W. 585.

A prompt payment under protest of an illegal tax to avoid the accrual of heavy penalties for delay, and a possible forfeiture of the right to do business, is deemed to be under duress, even though no proceedings have been taken or threatened to collect the tax. Atchison, Topeka & Santa Fé Railway Co. v. O'Connor (1911) 223 U. S. 280, 32 Sup. Ct. 216, 56 L. Ed. 436, Ann. Cas. 1913C, 1050.

A payment made to prevent a threatened sale of real estate to satisfy an illegal tax is considered as made under duress, if the tax sale would create a cloud on title, but not otherwise. Detroit v. Martin (1876) 34 Mich. 170, 22 Am. Rep. 512; The Sonoma County Tax Case (1882 C. C.) 13 Fed. 789; Davies' Ex'rs v. City of Galveston (1897) 16 Tex. Civ. App. 13, 41 S. W. 145; Phelan v. City and County of San Francisco (1898) 120 Cal. 1, 52 Pac. 38. See also Tozer v. Skagit County (1904) 34 Wash. 147, 75 Pac. 638. (For a brief statement of the conflicting doctrines as to what constitutes a cloud on title, see Pomeroy's Equitable Remedies, §§ 733, 734.)

A payment of taxes made to enable the owner of land to record his deed has been held to be under duress. State v. Nelson (1889) 41 Minn. 25, 42 N. W. 548, 4 L. R. A. 300. Contra: Weston v. Luce County (1894) 102 Mich. 528, 61 N. W. 15. But see Gage v. City of Saginaw (1901) 128 Mich. 682, 84 N. W. 1100, 87 N. W. 1027 (statutory).

Taxes paid under duress may be recovered, though no protest was made at the time of payment. Horgan v. Taylor (1914) 36 R. I. 232, 89 Atl. 1058.

If there was no duress, the mere statement that the payment was made

MOSES v. MACFERLAN.

(Court of King's Bench, 1760. 2 Burr. 1005.)[48]

This case is printed at page 17, supra.[48]

MARRIOT v. HAMPTON.

(Court of King's Bench, 1797. 7 Term R. 269.)

The defendant formerly brought an action against the present plaintiff for goods sold, for which the plaintiff had before paid and obtained the defendant's receipt; but not being able to find the receipt at that time, and having no other proof of the payment, he could not defend the action, but was obliged to submit and pay the money again, and he gave a cognovit for the costs. The plaintiff afterwards found the receipt, and brought this action for money had and received in order to recover back the amount of the sum so wrongfully enforced in payment. But Lord Kenyon was of opinion at the trial that after the money had been paid under legal process, it could not be recovered back again, however unconscientiously retained by the defendant, though the case of Moses v. Macferlan, 2 Burr. 1009, was referred to; and thereupon the plaintiff was nonsuited.

Gibbs now moved to set aside the nonsuit and to grant a new trial; relying on a subsequent case of Livesay v. Rider, E. 22 Geo. III, B. R., where on a similar motion the Court held such an action maintainable. And he pressed for the opinion of the Court in order that the question might be settled.

Lord Kenyon, Ch. J. I am afraid of such a precedent. If this action could be maintained I know not what cause of action could ever be at rest. After a recovery by process of law there must be an end of litigation, otherwise there would be no security for any

"under protest" does not justify a recovery. Railroad Co. v. Commissioners (1878) 98 U. S. 541; Brunson v. Board of Directors of Crawford County Levee Dist. (1913) 107 Ark. 24, 153 S. W. 828, 44 L. R. A. (N. S.) 293, Ann. Cas. 1915A, 493.

By statute in many states an illegal tax or license fee, paid without compulsion of legal proceedings, may nevertheless be recovered, though sometimes it is held that, to entitle plaintiff to recover, such tax must have been paid "under protest." Smith v. Tennessee Coal, Iron & R. Co. (1915, Ala.) 68 South. 865; Otis v. San Francisco (1915, Cal.) 148 Pac. 933; Jackson Hill Coal & Coke Co. v. Board of Com'rs of Sullivan County (1914) 181 Ind. 335, 104 N. E. 497; Commercial Nat. Bank of Council Bluffs v. Board of Sup'rs of Pottawattamie County (1915) 168 Iowa, 501, 150 N. W. 704; Neilson v. San Pete County (1912) 40 Utah, 560, 123 Pac. 334; and cases cited in 37 Cyc. 1184, note 79.

[48] Money paid pursuant to a void judgment may be recovered. Hollingsworth v. Stone (1883) 90 Ind. 244, 248. See, also, Murray v. Moorer (1840) Cheves (S. C.) 111. But see Elston v. City of Chicago (1866) 40 Ill. 514, 89 Am. Dec. 361.

Money collected by execution upon a judgment already satisfied may be recovered. Wisner v. Bulkley (1836) 15 Wend. (N. Y.) 321.

person. I cannot therefore consent even to grant a rule to shew cause, lest it should seem to imply a doubt. It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial; and they are as often refused; but this goes much further.

ASHHURST, J., of the same opinion.

GROSE, J. It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again because they were not properly prepared the first time with their evidence. Of the general principle there can be no doubt; and though the last case cited seems to throw some ambiguity upon it, yet some of the positions there stated are so entirely repugnant to every principle of law, that I have less difficulty in disregarding the whole authority of it.

LAWRENCE, J. If the case alluded to be law, it goes the length of establishing this, that every species of evidence, which was omitted by accident to be brought forward at the trial, may still be of avail in a new action to overrule the former judgment, which is too preposterous to be stated.

Rule refused.*

DUPUY v. ROEBUCK.

(Supreme Court of Alabama, 1845. 7 Ala. 484.)

Writ of error to the Circuit Court of Jefferson.

This was an action of assumpsit, at the suit of the defendant in error against the plaintiff. The declaration contains two counts. In the first it is alleged that the defendant below recovered a judgment against the plaintiff, on, &c., in, &c., for the sum of, &c., which judgment was reversed by this Court, on, &c., and the cause remanded; that previous to the reversal of that judgment, an execution was placed in the sheriff's hands, requiring him to make the amount thereof, and the same was satisfied by the plaintiff in this action. It is then stated that the defendant below submitted to a non-suit in that case; in consideration whereof, he became liable to refund the amount paid to the sheriff, and thereupon promised, &c. The second count is for money had and received, &c.

The cause was tried on the pleas of non-assumpsit and set off. On the trial, the defendant excepted to the ruling of the Court. It is shown by the bill of exceptions, that the plaintiff having proved the truth of the allegations, contained in the first count of the declaration, rested his case. The defendant relied on an alleged breach of warranty by the plaintiff, as a set-off to the plaintiff's claim.

The Court charged the jury, that conceding the truth of all the testimony in the cause, it did not furnish a defence to the action. A verdict was returned for the plaintiff, and judgment rendered accordingly.

*Compare Windbiel v. Carroll (1878) 16 Hun (N. Y.) 101, page 65, supra.

COLLIER, C. J.[49] In Duncan v. Ware's Ex'rs, 5 Stew. & P. 119, 24 Am. Dec. 772, it was held that assumpsit for money had and received, would lie, to recover back money paid upon a judgment which was afterwards reversed. But in that case, as the reversal was for irregularity merely, and the debt was justly due, the defendant was permitted to retain the money. A similar decision was made in Green v. Stone, 1 Har. & J. (Md.) 405, where it was said that the plaintiff could not recover, unless the retention of the money by the defendant was contrary to equity and right; the defendant may resort to any equitable or conscientious defence to repel the claim of the plaintiff, and may show the justice of his original claim; so the plaintiff may prove, that he is not in law or justice liable to pay the same. "A judgment reversed, becomes mere waste paper, and the rights of the party, immediately on the reversal, are restored to the same situation in which they were, prior to the pronouncing of the judgment so reversed." In Clark v. Pinney, 6 Cow. (N. Y.) 297, it was said, when money is paid upon an erroneous judgment, which is subsequently reversed, "the legal conclusion is irresistible, that the money belongs to the person from whom it was collected. Of course he is entitled to have it returned to him." And the action, it was determined, could be maintained, although, upon the reversal of the judgment, the cause was remanded, and was still pending in the primary court. Sturges v. Allis & Lee, 10 Wend. (N. Y.) 354; see, also, Lazell v. Miller, 15 Mass. 207; Isom v. Johns, 2 Munf. (Va.) 272; Hosmer v. Barret, 2 Root (Conn.) 156; Duncan v. Kirkpatrick, 13 Serg. & R. (Pa.) 292; Jamaica v. Guilford, 2 D. Chip. (Vt.) 103; Dennett v. Nevers, 7 Greenl. (Me.) 399; Hamilton v. Aslin, 3 Watts (Pa.) 222.

The action of assumpsit for money had and received, has been sometimes assimilated to a bill in equity, and the true test to the plaintiff's right to recover, said to depend upon the fact, whether the defendant can, in equity and good conscience, retain the money sought to be recovered. Although the law is thus generally stated, the adjudged cases show what is meant by an equitable right to retain money paid upon a judgment, which was afterwards reversed. It must grow out of, or be connected with, the case in which the judgment was vacated. Thus the party who has received the money, may show that he is entitled to recover for the cause alleged, though he mistook the appropriate remedy, or irregularities intervened which made it erroneous. But it is not permissible to justify the retention, by showing that the party has another cause of action, in which he will be entitled to recover as much as he received and retains. Such a defence could not be entertained, consistently with principle, unless it embraced a demand that was a proper subject of set off. If it was a breach of covenant for quiet enjoyment, or other unliquidated demand, distinct from the case in which the money was paid, it could not be interposed as a bar to the action. In such

[49] The statement of facts is abridged and a portion of the opinion is omitted.

case, to make his demand available, the defendant must become the actor in a suit, and have the damages he has sustained, ascertained by a judgment. * * *

The consequence of what we have said, is, that the judgment of the Circuit Court must be affirmed.[50]

[50] In Teasdale v. Stoller (1896) 133 Mo. 645, 34 S. W. 873, 54 Am. St. Rep. 703, the defendant's judgment was reversed on a technicality, although his claim was a just one. The court, Brace, P. J., in holding that money paid in satisfaction of the judgment could not be recovered, said: "It is sometimes laid down as a general rule that money paid on a judgment that is afterwards reversed may be recovered back in an action for money had and received. The great majority of the cases which are cited in support of this rule are cases in which payment of the judgment, in whole or in part, has been coerced by process thereon, or otherwise. These cases are, of course, not in conflict with the well-settled principle of law that one who voluntarily pays money, with full knowledge of all the facts, and without any fraud having been practiced upon him, cannot recover it back because, at the time of the payment, he was ignorant of, or mistook, the law as to his legal liability. This doctrine has been frequently applied to payments on judgments that have been afterwards reversed, and in some of the cases it has been held that, if the payment was voluntary, no recovery could be had; making the case turn upon the single fact of voluntary payment. Of this class of cases, the recent case of Gould v. McFall, 118 Pa. 455, 12 Atl. 336, 4 Am. St. Rep. 606, is an example. There are other cases in which a right of recovery has been maintained, although the judgment was voluntarily paid, of which class Scholey v. Halsey, 72 N. Y. 578, is an example. In this latter class of cases it will be found that upon the facts the action was maintained upon the ground that, although the payment was voluntary, yet the defendant having received the money of the plaintiff, to which, ex æquo et bono, he was not entitled, the same was recoverable by writ of restitution, or by action in assumpsit for money had and received. But it is believed that no well-considered case can be found in which it has been held, where money has been voluntarily paid on account or in satisfaction of a judgment afterwards reversed, and the party to whom it was paid, in equity and good conscience, was entitled to the same, that it could be recovered back. To so hold would be entirely repugnant to the very principle upon which the action is founded. As was said in an early case by Chase, C. J.: 'The plaintiff cannot recover unless the defendant's retaining the money is contrary to equity and right. The defendant may resort to any equitable or conscientious defense to repel the claim of the plaintiff, and may show the justice of his original claim.' Green v. Stone, 1 Har. & J. (Md.) 408. The justice of the defendants' original claim is not only shown by the conceded facts of this case, but the justice of the judgment set aside was established in the judgment of this court upon appeal therefrom. The defendants lost the benefit thereof merely by 'a slip' in their own procedure, and ought not to be compelled to refund the money which they rightfully received, and which, in equity and good conscience, they may retain."

In Stevens v. Fitch (1846) 11 Metc. (Mass.) 248, the defendant had recovered judgment against Stephen Stevens for flowage of lands caused by the erection of a dam on the land of the latter. The judgment had, however, been paid by Jonathan Stevens, the present plaintiff, who owned the mill and mill site, and who had agreed to indemnify Stephen Stevens for all damages resulting therefrom. The defendant's judgment having been set aside by the Supreme Court, Jonathan Stevens sued to recover the money paid in satisfaction of the judgment against Stephen Stevens. The court, speaking through Wilde, J., held for the plaintiff, and to the objection that there was no privity between him and the defendant said: "The plaintiff was the sole party in interest, and he paid the money on his own account, which he was obliged to pay, on a consideration which has failed; and this shows a privity of contract implied by law."

SECTION 4.—COMPULSION COUPLED WITH ILLEGALITY

WHEATON v. HIBBARD.

(Supreme Court of New York, 1822. 20 Johns. 290, 11 Am. Dec. 284.)

In error to the Court of Common Pleas of Onondaga county. Hibbard brought an action of assumpsit against Wheaton in a justice's court. The declaration contained the common money counts, to which the defendant pleaded non assumpsit, with notice that the money received by the defendant was for excess of interest above the lawful rate of interest. The justice gave judgment for the plaintiff for thirty-five dollars, damages, and three dollars and sixty-nine cents, costs. Wheaton appealed from this judgment to the Court of Common Pleas.

In the latter court a special verdict was found in favor of Hibbard and judgment was rendered thereon. And on this judgment a writ of error was brought returnable to this court.

SPENCER, C. J.[51] * * * The points reserved by the special verdict, and submitted to the court, are, 1st. Whether an action of assumpsit will lie after a year, in favor of the person paying usurious interest; and, 2d. Whether the law, under the facts found, presumes a promise. * * *

The statute to prevent usury, (1 N. R. L. 64,) after regulating the rate of interest, authorizes the party paying usurious interest, to sue for and recover the excess above seven per cent., within one year then next, with costs of suit, in an action of debt, founded on the act; and it prescribes a succinct form of declaring. It then provides, that if the person paying usury shall not, within the time aforesaid, really and bona fide, commence his suit for the money so paid, or suffers it to be delayed or discontinued, then it shall be lawful for any other person, within one year after such neglect, to sue for and recover the same, in manner aforesaid, one moiety whereof is given to such person, and the other moiety to the use of the poor of the town in which the offence is committed.

This provision is peculiar to our statute. By the 12 Anne, ch. 16, the party receiving more than the legal rate of interest, forfeited the treble value of the moneys or other things lent. It is contended, that the person who pays above the legal rate of interest, is confined to the statute remedy, and that he must not only sue in an action of debt, but that the suit must be within one year, or he is forever precluded. Now the principle is, that where a party has a remedy at common law for a wrong, and a statute be passed, giving a further remedy, without a negative of the common law remedy, expressed or implied, he may, not-

[51] The statement of facts is abridged and portions of the opinion are omitted.

withstanding the statute, have his remedy by action at common law. 1 Com. Dig. Action on Statute, C. There are no words in the statute, either expressly or impliedly, negativing the common law remedy. The injured party cannot have both remedies, and if he neglect to pursue the statute remedy for more than a year, his right of action at common law would be suspended during the second year, for, peradventure, a third person may prosecute. But, in the present case, the excessive interest was received in 1816 and 1817. It was incumbent on the defendant to show, had the fact been so, that he had been sued within the second year; and not having shown this, the statute remedy is gone. It is undeniable, that a party who has paid excessive interest may, at common law, recover the excess, in an action for money had and received. The law considers the borrower rather as a victim than an aggressor. The statute prohibits usury, in order to protect needy and necessitous persons from the oppression of usurers, who are eager to take advantage of the distresses of others, and who violate the law only to complete their ruin. In such a case, the maxim of potior est conditio defendentis has never been applied. But the party injured cannot recover any part of the principal and legal interest; and to entitle him to maintain the action, he must show that he has done all that equity requires. Bacon, Usury, G. 1 Term Rep. 153. * * *

Judgment affirmed.[52]

[52] Accord: The State Bank v. Ensminger (1844) 7 Blackf. (Ind.) 105; Brown v. McIntosh (1876) 39 N. J. Law, 22. In Brown v. McIntosh, Reed, J., said: "This claim for the recovery of money usuriously paid, on first impression seems to encounter two fundamental maxims of the common law. As it was apparently paid voluntarily, the rule volenti non fit injuria would appear to forbid its recovery. As it was paid in contravention of the provision of a statute, the maxim in pari delicto potior est conditio defendentis, would appear to place another obstacle in the way of any remedy for a party to the payment. * * * The common law courts distinguished a class of statutes, a payment made in violation of the provisions of which did not fall within the operation of the rule of in pari delicto. This distinction is well stated in note F to the case of Jones v. Barkley, Dougl. 697, a: 'Where the law that creates the illegality in the transaction, was designed for the coercion of one party and the protection of the other, or where one party is the principal offender and the other only criminal, from a constrained acquiescence in such illegal conduct in these cases, there is no parity of delictum at all between the parties.' * * * It is observable that the reasoning which relieves the payer of the character of particeps criminis, also takes his payment out of the operation of the rule relative to voluntary payments. No payment obtained through oppression or undue advantage is voluntary, and the law presumes every payment made to a person who is by statute forbidden to receive it, where the statute is for the protection of the payer, as made through oppression and undue advantage."

The early case of Tompkins v. Bernet (1693) 1 Salk. 22, contra, is overruled. See Clark v. Shee (1774) Cowp. 200, where Lord Mansfield, C. J., said: "That case has been denied a thousand times." The same judge in Smith v. Bromley (1760) Dougl. 696, note, page 556, infra, says as to this case: "I think the judgment may have been right, but the reporter [Salkeld], not properly acquainted with the facts, has recourse to false reasons in support of it. The case must have been, as I take it, an action to recover back what had been paid, in part of principal, and legal interest upon an usurious contract; and, therefore, the action would not lie, for so far as principal and legal interest went, the debtor was obliged, in natural justice, to pay, therefore he could not recover

NICHOLLS v. SKEEL.

(Supreme Court of Iowa, 1861. 12 Iowa, 300.)

Appeal from Scott District Court.

LOWE, C. J. The question reserved for our determination is, whether usurious interest voluntarily paid by the borrower to the lender can be recovered back.

The English statutes are peremptory, and declare usurious contracts absolutely void. A number of the American statutes do the same thing. Other American statutes provide by express enactment for the recovery back of usurious interest. Both classes of these statutes view the borrower as an innocent victim, and the lender a rapacious Shylock, and visit their penalties alone upon the latter. Decisions in England and America based upon these statutes are cited by the plaintiff as his authority for bringing and maintaining an action of this kind.

Our usury law is quite dissimilar in its provisions to the above statutes. It does not declare the contract void. It prohibits usury as an evil, affecting the business morals of society and the healthy action of trade. It regards the parties to such a contract in pari delicto, holds them alike obnoxious to its animadversions, and makes the school fund the recipient of the forfeitures resulting from their illegal acts.

To permit the borrower, under these circumstances, to sue for and recover back usury which he had paid without objection, would be to allow him to take advantage of his own unlawful conduct, defeat the policy of the statute, defraud the school fund, encourage similar violations; and a suit for such a purpose cannot and ought not to be maintained. The Ohio and Massachusetts authorities will sustain this decision.

Judgment below affirmed.[53]

SMITH v. BROMLEY.

(Nisi Prius, at Guildhall, before Lord Mansfield, C. J., 1760. 2 Dougl. 696, note.)

Action for money had and received to the plaintiff's use, upon this case: The plaintiff's brother having committed an act of bankruptcy, the defendant, being his chief creditor, took out a commission against him, but, afterwards, finding no dividend likely to be made, refused to

it back. But for all above legal interest, equity will assist the debtor to retain, if not paid, or an action will lie to recover back the surplus, if the whole has been paid."

[53] See also Gross v. Coffey (1895) 111 Ala. 468, 20 South. 428. (Statute does not render usurious contracts void but only provides a defence thereto.) Marvin v. Mandell (1878) 125 Mass. 562. (Statute merely makes unenforceable the contract to pay the excessive interest.)

For a discussion of recent English legislation on the subject of usury, see the several opinions in Samuel v. Newbold, [1906] A. C. 461.

sign his certificate. But on frequent application, and earnest entreaties, made by the bankrupt to one Oliver, a tradesman in town, who was an intimate friend of the defendant, who lived in Cheshire, he got Oliver to write to the defendant several times, and he at last prevailed on the defendant to send him, (Oliver,) a letter of attorney, empowering him to sign the certificate, which Oliver would not do, unless the bankrupt or somebody for him, would advance £40., and give a note for £20. more, and which, on Oliver's signing the certificate for the defendant, the plaintiff, (who was the bankrupt's sister,) paid, and gave to Oliver accordingly, who thereupon gave her a receipt for the money, promising to return it, if the certificate was not allowed by the Chancellor. The certificate was allowed. The plaintiff afterwards brought her action against Oliver to recover back the £40. from him, but, that action coming on to be tried before Lord Mansfield, at Guildhall, at the sittings after last Trinity term, and it then appearing that Oliver had actually paid over, or accounted for, the £40. to Bromley, and his Lordship being clearly of opinion, that this action would not lie against the plaintiff's own agent, who had actually applied the money to the purpose for which it was paid to him, the plaintiff was nonsuited in that action; and now she brought this action against Bromley himself; which coming on to be tried, it was proved, that the money was received by Oliver, and paid over to the defendant.

It was contended for the plaintiff, that this money was paid, either without consideration, or upon one that was illegal, and, in either case, was recoverable back by this action.

For the defendant, it was argued, that there was certainly a consideration for the payment of the money, to wit, the signing of the bankrupt's certificate; that, if this consideration was illegal, the plaintiff was particeps criminis, had paid it voluntarily and knowingly, and without any deceit, and so was within the case of Tomkins v. Bernet, H. 5 Will. III, at N. Pr. before Treby, Chief Justice, 1 Salk. 22; but that there was nothing illegal in it; for it was the money of a third person, and so no diminution of the bankrupt's effects, or fraud upon his creditors; in which case only, whereby the distribution becomes unequal, is there any iniquity in receiving a consideration for signing the certificate.

But Lord Mansfield, C. J.,[54] was of a different opinion. He said, it was iniquitous and illegal in the defendant to take, and, therefore, it was so to detain, this £40. If a man makes use of what is in his own power to extort money from one in distress, it is certainly illegal and oppressive, and, whether it was the bankrupt or his sister that paid the money, it is the same thing. The taking money for signing certificates is either an oppression on the bankrupt or his family, or a fraud on his other creditors. It was a thing wrong in itself, before any provision was made against it by statute; for, if the bankrupt has conformed to all the law requires of him, and has fairly given up his all, the creditor

[54] Portions of the argument for defendant and of the opinion are omitted.

ought, in justice to sign his certificate: but, on the other hand, if the bankrupt has been guilty of any fraud, or concealment, the creditor ought not to sign, for any consideration whatever. If any near relation is induced to pay the money for the bankrupt it is taking an unfair advantage, and torturing the compassion of his family: if it is the money of the bankrupt himself, it is giving one creditor his debt to the exclusion of the others, and a fraud upon them. * * *

It is argued, that, as the plaintiff founds her claim on an illegal act, she shall not have relief in a Court of Justice. But she did not apply to the defendant or his agent to sign the certificate on an improper or illegal consideration; but, as the defendant insisted upon it, she, in compassion to her brother, paid what he required. If the act is in itself immoral, or a violation of the general laws of public policy, there, the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is, potior est conditio defendentis. But there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit, &c. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover, and it is astonishing that the reports do not distinguish between the violation of the one sort and the other.[55] * * *

The case of money given to a solicitor to bribe a Custom-House officer, cited in that of Tomkins v. Bernet, is against his own agent, and, therefore, he cannot recover. But the present is the case of a transgression of a law made to prevent oppression, either on the bankrupt, or his family, and the plaintiff is in the case of a person oppressed, from whom money has been extorted, and advantage taken of her situation and concern for her brother. This does not depend on general reasoning only, but there are analogous cases; as that of Astley v. Reynolds, B. R. M. 5 Geo. II, 2 Str. 915. There, the plaintiff having pawned some goods with the defendant for £20., he refused to deliver them up, unless the plaintiff would pay him £10. The plaintiff had tendered £4. which was more than the legal interest amounted to; but, finding that he could not otherwise get his goods back, he at last paid the whole demand, and brought an action for the surplus beyond legal interest, as money had and received to his use, and recovered. It is absurd to say, that any one transgresses a law made for his own advantage, willingly. Put the case, that a man pawns another's goods; the right owner might be obliged to pay more than the value, and would have no relief, if this action will not lie. As to the case of usury, it was decided both by Lord Talbot, and Lord Hardwicke, in the case of Bosanquet v. Dashwood, Canc. M. 8 Geo. II, ca. temp. Talb. 38, on a bill brought to compel the defendant to refund what he had received above principal and legal interest, that the surplus should be repaid. Upon the whole, I am persuaded it is necessary, for the better support

[55] His Lordship here discussed Tomkins v. Bernet (1693) 1 Salk. 22. See page 555, note, supra.

and maintenance of the law, to allow this action; for no man will venture to take, if he knows he is liable to refund. Where there is no temptation to the contrary, men will always act right.

The jury, under his Lordship's direction, found a verdict for the plaintiff, with £40. damages.[56]

GILMOUR v. THOMPSON.

(Marine Court of the City of New York, General Term, 1875. 6 Daly, 95.)

Appeal by defendants from a judgment in favor of the plaintiff and against the defendants, for $284.54, entered on the decision of a judge of the Marine Court, rendered after a trial before him without a jury.

The action was brought to recover from the defendants the amount (with interest) of a certain promissory note for $226.35, alleged to have been exacted from the plaintiff by the defendants, in fraud of the plaintiff's other creditors, as a condition of the signing by the defendants of a compromise agreement made by the plaintiff with his creditors, on account of his inability to pay them all in full, and which the plaintiff had been obliged to pay to a bona fide holder. On the trial, no evidence was given on the part of the defendant, and the facts, as they were sworn to by the plaintiff, were as follows:

On May 24th, 1873, the defendants, who were a firm doing business under the name of James Thompson & Co., were creditors of the plaintiffs in the sum of $377.25, and on that day joined with the other creditors of the plaintiff in signing a compromise agreement by which his creditors agreed to accept, in full satisfaction of their respective claims, the plaintiff's promissory notes, payable at six months, with satisfactory indorsers, for forty per cent. of their respective claims. The defendants signed this agreement after having asked for and secured from the plaintiff a promise that he would secure their whole claim to them. In pursuance of this agreement, the plaintiff delivered to the defendants the compromise note, satisfactorily indorsed, and also, about the 16th or 18th of June, 1873 (after the signing of the compromise agreement), delivered to them a note at five months, for $226.-35, the balance of their claim. Before maturity of this note, the defendant indorsed and delivered it to a holder for value, and without notice of any defense to the note, and the plaintiff was obliged to and did pay it to him.

McAdam, J. In Bean v. Brooknivel & Rankin, 7 Bankr. Reg. 575, Chief Justice Dillon laid down the rule applicable to this class of cases as follows: "The rules of law respecting the good faith to be observed

[56] "It is somewhat difficult to understand how a debtor who simply pays his debt in full can be considered the victim of oppression or extortion because such payment is exacted by the creditor as a condition of his signing a compromise, or to see how both the debtor and creditor are not in pari delicto." Per Andrews, J., in Solinger v. Earle (1880) 82 N. Y. 393.

by all who unite in a composition deed, are well known and well settled, and rest upon the soundest policy and upon the clearest principles of equity, commercial morality and fair dealing. The temptation to obtain undue or secret advantages is so great that the necessity for the severe rules which have been declared by the courts to repress it, is undeniable. All must be open and fair.[57] If the creditor appealed to by his debtor makes it a condition of his uniting in a composition that he shall have any advantage not enjoyed or made known to the others, the transaction cannot stand either at law or in equity; it is a fraud upon creditors, and they can avoid it. It is treated as oppression or duress toward the debtor, and he may defend against any promise to pay, made under such circumstances, or, if he has actually paid, he may recover back the amount, as the law does not consider the parties in pari delicto, nor regard such payment thus made as voluntary, and allows such recovery on grounds of public policy."[58] * * *

In Smith v. Cuff, 6 Maule & S. 160, it appeared that the defendant, being a creditor of the plaintiff, entered into a composition deed with the other creditors, to receive ten shillings on the pound, under an agreement with the plaintiff that he would give defendant his promissory note for the remainder of the debt, which notes were accordingly given and the composition was paid to defendant, and he negotiated the promissory note, the holder of one of which enforced payment from plaintiff by action, and it was held that plaintiff might recover back the amount from the defendant in an action for money paid, had and received. The case just cited is like the one now under consideration. Lord Ellenborough, Ch. J., in the last case, said: "This is not a case of in pari delicto, it is oppression on one side and submission on the other, it never can be predicated as pari delicto when one holds the rod and the other bows to it. There is an inequality of situation between these parties—one was creditor the other debtor—who was driven to comply with the terms which the former chose to enforce, and is there any case where money, having been obtained extorsively and by oppression, and in fraud of the party's own act, as it regards the other creditors, it has been held that it may not be recovered back? On the contrary, I believe that it has been uniformly decided that an action lies." In the case under examination, the defendant, as in the case cited, negotiated the note before maturity to an innocent holder for value and without notice; in his hands there was no defense to the note, and its payment, under the circumstances, leaving the plaintiff no other option, was not voluntary, but coercive.

In Wilson v. Ray, 10 Ad. & Ell. 82, it appeared that the plaintiff, being about to compound with his creditors, defendant, a creditor, re-

[57] In Hickman v. Galveston Dry Goods Co. (1906) 42 Tex. Civ. App. 582, 94 S. W. 157, the court held that an arrangement under a composition agreement whereby one creditor is to be paid in full is valid, if fair and open; the vice of such special agreements being in their secrecy.

[58] Citations omitted.

fused to subscribe the deed unless he were paid in full. Plaintiff, to obtain his signature, gave a bill payable to defendant's agents, for the difference between twenty shillings in the pound and eight shillings, the proportion compounded for; defendant then signed the deed. Plaintiff did not honor the bill when due, but on subsequent application he paid it some months after the dishonor, by two instalments to the payee, and defendant received the money. The other creditors were paid according to the deed, and the court held that plaintiff could not recover back the amount paid to defendant above eight shillings in the pound, for that the transaction had been closed by a voluntary payment with full knowledge of the facts, and ought not to be reopened; and that it made no difference that the sum in question had not been recovered by action. In the case cited, the plaintiff was under no obligation to pay the bill. It was held at maturity by the payee, and the plaintiff, with full knowledge of these facts, paid the amount of the bill in two instalments. The plaintiff having the option whether he would pay the bill or not, voluntarily closed the transaction by payment, and there was no reason why it should be reopened.[59] But in the present case this voluntary element is wanting. The payment was coerced and involuntary. Smith v. Cuff, supra.

The defendants claim that the case of Smith v. Cuff does not apply to this case, for the reason that the note was given after the defendant signed the composition deed, and that having had his locus pœnitentiæ, the giving of the note was relieved from the effects of coercion or duress, and cites Atkinson v. Denby, 6 Hurl. & Nor. 778, and Higgins v. Pitt, 4 Exch. 325, to sustain his position. We do not think these cases go as far as the defendants contend. The consideration of the note was fraudulent for the reasons stated, and although given after the composition deed was signed, it was part and parcel of the original corrupt agreement exacted before the deed was signed, as a condition for its execution, and there is nothing in the case to take it out of the rule laid down in Smith v. Cuff, supra.

For these reasons the justice at the trial term very properly found for the plaintiff, and the judgment rendered by him is therefore affirmed with costs and $30 allowance.[60]

[59] Accord: Smith v. Ziegler (1892) 17 N. Y. Supp. 338; Batchelder & Lincoln Co. v. Whitmore (1903) 122 Fed. 355, 58 C. C. A. 517.

[60] Upon appeal, the Court of Common Pleas adopted the opinion of McAdam, J., and affirmed the judgment (1875) 6 Daly, 95, 100.

Accord: Crossley v. Moore (1878) 40 N. J. Law, 27.

In Atkinson v. Denby (1862) 7 H. & N. 933, Cockburn, C. J., said: "Where the one person can dictate, and the other has no alternative but to submit, it is coercion, and, in the language of Lord Ellenborough, 'one holds the rod and the other bows to it.' Smith v. Cuff (1817) 6 M. & S. 165. Where a debtor offers his creditors a composition, whereby they are all to receive the same proportionate amount in respect of their debts, it is contrary to the policy of the law to allow him to purchase the consent of one creditor by payment of his debt in full. It is said that both parties are in pari delicto. It is true

DAIMOUTH v. BENNETT.[61]

(Supreme Court of New York, General Term, 1853. 15 Barb. 541.)

This action was originally brought in a justice's court. The plaintiff alleged in his complaint that the defendant was justly indebted to him in the sum of thirty dollars, for money had and received by the defendant to the plaintiff's use. The answer denied the indebtedness, and set up matters of defense upon the merits. The justice rendered judgment in favor of the plaintiff, for the amount claimed, with costs. This judgment was affirmed by the county court. The facts of the case are as follows: The plaintiff's son William was charged by the defendant with having passed to him a ten dollar counterfeit or altered bank note; a warrant had been issued against him, and he had been arrested on said charge. While he was under such arrest, the parties to this action made an agreement, by which the plaintiff promised to pay and did pay the defendant thirty dollars, to settle the criminal prosecution against the plaintiff's son, on said charge. The defendant, in consideration thereof, agreed to let the prisoner go and not to prosecute him further on said charge, and he was accordingly discharged. Prior to commencing this action, the plaintiff called on the defendant and demanded the repayment of the thirty dollars. It also appeared from the testimony of the plaintiff's son William, that he never passed the bill to the defendant; neither had he passed any bill to him, or paid him any money at any time prior to said complaint. There was no conflict of evidence in the case. When the plaintiff closed his proof, the defendant moved for a nonsuit, on the ground that the plaintiff had failed to make out a legal cause of action, which was denied.

that both are in delicto, because the act is a fraud upon the other creditors, but it is not par delictum, because the one has the power to dictate, the other no alternative but to submit."

See also the excellent discussion of this principle by Lowell, J., in In re Chaplin (D. C. 1902) 115 Fed. 162, 165.

In Solinger v. Earle (1880) 82 N. Y. 393, it was held that a secret payment by a brother-in-law of the debtor to induce a creditor to sign a composition agreement could not be recovered back; Andrews, J., who delivered the opinion of the court, saying: "We see no ground upon which it can be held that the plaintiff in this case was not in par delictum (sic) in the transaction with the defendants. So far as the complaint shows, he was a volunteer in entering into the fraudulent agreement. It is not even alleged that he acted at the request of the debtor. And in respect to the claim of duress, upon which Smith v. Bromley, 2 Doug. 696 note, was decided, we are of the opinion that the doctrine of that and the subsequent cases referred to can only be asserted in behalf of the debtor himself, or of a wife or husband, or near relative of the blood of the debtor, who intervenes in his behalf and that a person in the situation of the plaintiff, remotely related by marriage, with a debtor, who pays money to a creditor to induce him to sign a composition, cannot be deemed to have paid under duress by reason simply of that relationship, or of the interest which he might naturally take in his relative's affairs."

[61] The principal case, which might logically belong under chapter III, section 2, supra, is inserted here for purposes of contrast.

CRIPPEN, P. J. The case presents the single point, whether money paid for the purpose of settling or compounding a supposed felony can be recovered back by the party paying it. It was insisted by the plaintiff's counsel that there is no statute, or principle of the common law, declaring the payment of money to compound a felony a crime, in the party thus paying the money; that it is the taking or receiving of the money, and not the payment of it, that constitutes the offense. It is true that the statute only declares the party guilty of a crime, who knowing of the actual commission of a felony, shall take any money or property of another, upon an agreement or undertaking to compound or conceal such felony or crime, or to abstain from any prosecution thereof. 2 R. S. 4th ed. p. 871, pt. 4, c. 1, tit. 5, § 18; also page 875, tit. 6, § 12.

The offense of compounding a crime created by statute, is undoubtedly confined to the party receiving the money or property, and does not extend to the party paying it. This position of the plaintiff's counsel, however, falls far short of reaching the whole difficulty in his case. Another important principle is involved, which to my mind is a conclusive answer to this action. The contract made between the parties, and the payment of the money under it, was immoral and illegal. The statute above cited declares the party receiving the money under such circumstances a criminal. The common law declares all contracts to do acts that are indictable or punishable criminally, to be illegal and void. It is a fundamental rule of the common law, that whenever a contract is illegal as against morality or public policy, neither a court of law nor a court of equity will interpose to grant relief to the parties thereto. It is manifest that the contract under which the plaintiff paid his money to the defendant, was malum in se, involving criminality and moral turpitude; it rendered the defendant liable to indictment and criminal punishment. If a contract be evil in itself, involving criminality and moral turpitude, neither party to such contract can have any remedy against the other; nor can money paid upon such contract be reclaimed by law or in equity. Story on Cont. §§ 489, 490. The same author also lays down the rule of law, that if a sum of money be paid by way of compounding a felony, it cannot be recovered back, on a refusal of the other party to perform his part of the contract; nor can an action be maintained to enforce the performance of such contract. If the money cannot be recovered back for a refusal of the party receiving it to perform his part of the agreement, it would seem very clearly to follow, that where the contract has been fully performed as agreed upon between the parties, no action can be maintained to recover back the money. No proof was given on the trial that the defendant did not keep his agreement with the plaintiff. It appeared that nothing further was done with the criminal prosecution against the plaintiff's son; the payment of the money by the plaintiff to the defendant, put an end to the whole matter; the strong arm of the law

was paralyzed thereby, and the plaintiff's son was discharged from the arrest on the warrant.

Where a contract is malum prohibitum—merely evil because it is prohibited by statute, and does not involve any moral turpitude or criminality—one party may have a remedy against the other, unless they are in pari delicto. But no relief will be granted even in such a case if the parties are both involved in moral guilt. Agreements to do acts which are indictable or punishable criminally, or to conceal or compound such acts; or to suppress evidence in a criminal prosecution, are utterly void. Story on Cont. § 569. Also all agreements which contravene public policy are void, whether they be in violation of law or morals, or obstruct the prospective objects flowing from some positive legal injunction. Story on Cont. § 545.

The money paid by the plaintiff to the defendant was intended to obstruct, and as the proof shows, did in fact obstruct and put an end to the prosecution of the plaintiff's son, who had been accused and even arrested for a high crime. The plaintiff was a party to the agreement; he paid the money to the defendant; he was a particeps criminis with the defendant, connected with him in committing an act declared by statute to be criminal, and which subjected the defendant, if not the plaintiff, to criminal prosecution.

Whenever a contract is forbidden of the common law or by statute, no court will lend its aid to give it effect. Chitty on Cont. 570. The same author also says that an agreement for suppressing evidence, or stifling or compounding a criminal prosecution, or proceeding for a felony or for a misdemeanor of a public nature, is void. Chitty on Cont. 582. It matters not whether the plaintiff's son was guilty or innocent of the charge made against him by the defendant; he had been arrested on a criminal warrant, charging him with a felony; while thus a prisoner the plaintiff compounded the offense and stifled the prosecution, by the payment to the defendant of the money now sought to be recovered back in this action. It was undoubtedly immoral, nay, criminal in the defendant to take the plaintiff's money under the agreement upon which it was paid to him; this, however, furnishes no legal ground to the plaintiff for recovering back the money. He is too deeply implicated in the wrong committed, by compounding the alleged felony, to command the aid of the law and of the courts, in restoring him to what he has wrongfully and foolishly paid to the defendant. There were some cases at an early day which seemed to hold the doctrine that where a party paid money upon an illegal transaction, he might recover it back again in an action for money had and received. But it has been holden in numerous cases, both in England and in this country, that in cases where money has been paid upon a consideration like that established by the proof in this case, it cannot be recovered back in an action for money had and received. In the cases of Smith v. Bromley, Doug. 696, and Browning v. Morris, Cowp. 790, Lord Mansfield decided that where certain acts were declared unlawful by statute,

intended to protect the unwary and the ignorant from the oppression and extortion of the more designing and cunning, there, although both parties were guilty of violating the law, yet they are not equally guilty; and in such cases the money might be recovered back by the party from whom it had been extorted, as in case of taking usury, &c. The learned judge also says that these cases are distinguishable from those which have held that money paid on account of the immorality of the consideration, involving moral turpitude, or hostile to public policy, cannot be recovered back. There are many cases which maintain the doctrine, and such no doubt is the settled law, that where a contract is made having for its ultimate purpose and intent, to aid in violating a positive law or principle of public policy, or to commit a breach of good morals, the courts will not assist in enforcing it, whatever may seem to be the justice of it as between the parties. In such a case the courts treat both parties as having trodden upon forbidden ground, equally in the wrong, and as being unworthy alike to ask for or receive their aid. In this case the parties deliberately agreed to violate the laws of the land; the plaintiff by paying and the defendant by receiving the sum of thirty dollars to compound an alleged felony; to stifle and discontinue a prosecution already commenced against the accused, for a high crime. A party who thus illegally and improperly pays away his money, and afterwards repents of his folly, and attempts by an action to recover it back, cannot receive the aid of a court of justice in such attempt.

I have come to the conclusion, from a careful examination of this case, that the plaintiff failed in establishing a legal cause of action against the defendant. The judgment of the justice's court and of the county court must be reversed, with costs of the appeal in the county court and in this court.[62]

[62] In Schultz v. Culbertson (1879) 46 Wis. 313, 1 N. W. 19, Lyon, J., said: "The agreement not to arrest and prosecute the plaintiff's son for the crime which the defendant charged he had committed, was unquestionably illegal and void, in that it interfered directly with the course of public justice, and was therefore against sound public policy. Such agreement was fully executed by the giving of the note in consideration thereof, and its payment; and by the failure of the defendant to cause the arrest and prosecution of the boy. The undisputed evidence shows that the crime had been committed, and the testimony of the defendant tends to show that the boy committed it. If the parties to this illegal agreement stood on an equal footing when they made it,—if there was no duress or other circumstance which placed the plaintiff in the attitude of a sufferer rather than a wrongdoer,—the law will not assist the plaintiff to recover the money which he has voluntarily paid in execution of it. Miller v. Larson, 19 Wis. 463. In such case it is quite immaterial that the plaintiff did not believe his son guilty of the crime charged. That is a fact to be considered on the question of duress (Osborn v. Robbins, 36 N. Y. 365), but not on the question of the illegality of the contract. The crime having been committed, and the boy being charged with having committed it, and his arrest therefor threatened, a contract to forbear prosecution is illegal, no matter how sincerely the plaintiff may have believed his son innocent."

HECKMAN v. SWARTZ.

(Supreme Court of Wisconsin, 1885. 64 Wis. 48, 24 N. W. 473.)

Appeal from circuit court, Green county.

This action was brought to recover $1,635, alleged to have been obtained from the plaintiff by the defendant, by duress of imprisonment, upon a warrant, issued upon complaint of the defendant, falsely charging the plaintiff with having committed the crime of fornication with one Mary Jane Swartz, the daughter of the defendant, and by threats of future and further prosecutions therefor. The cause was tried, and a special verdict returned by the jury. The plaintiff moved on such verdict for judgment against the defendant. The motion was denied. The plaintiff then interposed a motion to set aside the verdict, and for a new trial, which motion was also denied, and the court thereupon gave judgment for the defendant. One of the facts specially found by the jury was that defendant instituted the criminal proceedings against the defendant for the purpose of compelling him to make the settlement in question.

LYON, J.[63] I. * * * Our conclusions on this branch of the case are that the complaint charges a crime; that the justice had jurisdiction to issue the warrant; that such warrant is valid, and hence that the plaintiff was lawfully arrested.

II. The denial by the court of the plaintiff's motion for judgment on the special verdict is assigned for error. This presents the question, is the judgment for the defendant supported by such verdict? We understand the law to be well settled that, although an arrest may be for a just cause, and under valid process, yet if it be for an illegal purpose, and the person arrested pays money for his release, he may be considered as having paid it by duress of imprisonment, and may recover it back. It was so held in Richardson v. Duncan,[64] 3 N. H. 503; Severance v. Kimball, 8 N. H. 386; and in Hackett v. King, 6 Allen (Mass.) 58. So in Bull. N. P. (7th Ed.) 172, it is said: "If the arrest were by warrant from a justice of the peace on a charge of felony, * * * though a felony were committed, yet if the arrest be unlawfully made use of, it may be construed a duress."

We have already seen that the plaintiff was arrested under valid process, and the jury found that it was for just cause. But they found, also, that the defendant instituted the criminal proceedings for the purpose of compelling the plaintiff to make the settlement under which he paid the defendant the money he seeks to recover back in this

[63] The statement of the case is abridged, and portions of the opinion are omitted.

[64] "But it is now well settled, that when there is an arrest for improper purposes, without a just cause, or where there is an arrest for a just cause; but without lawful authority, or where there is an arrest for a just cause, and under lawful authority, for unlawful purposes, it may be construed a duress." Richardson v. Duncan (1826) 3 N. H. 508.

action; and that the money was paid (or, what is the same thing, the note of the Musser Bros. was delivered) under an agreement between the parties that the defendant would not and should not prosecute the plaintiff for any criminal offense.

The purpose for which the prosecution was instituted was unlawful. It was not to vindicate the peace and dignity of the state in any way, or to promote the public welfare, but to coerce the plaintiff to pay a claim which he was unwilling to pay. This was an abuse of the process of the court. Then, in order to accomplish such unlawful purpose, he agreed not to prosecute the plaintiff for any crime. This also was unlawful. It is equally illegal to compound a felony or a misdemeanor. Severance v. Kimball, supra, and cases there cited. See, also, Fay v. Oatley, 6 Wis. 42.

The purpose of the prosecution thus being unlawful, and the money having been paid pursuant to an unlawful agreement, if the plaintiff paid it for his release, it is duress of imprisonment, and he is entitled to recover his money. But there are findings which change entirely the aspect of the case. One of these is to the effect that the plaintiff did not make the payment to the defendant until after he was released from imprisonment and arrest. This is a most vital finding in the case, for it shows that the actual duress had ceased before the payment, and there was left for the determination of the jury only the question suggested in Schultz v. Culbertson, 46 Wis. 313, 1 N. W. 19, whether the original duress, or, more correctly speaking, the effect of it upon the plaintiff's mind, continued and influenced him to pay the money, although the actual imprisonment had ceased, or whether he paid it freely and voluntarily, uninfluenced by such former imprisonment. On that proposition the jury have found, in a variety of forms, that the payment was thus freely and voluntarily made. Hence, while facts are found which show at one time duress of imprisonment, other findings show, in effect, that after such duress and the influence of it had ceased, the plaintiff freely and voluntarily paid the money which he now sues to recover back. We think the special verdict supports the judgment for the defendant and hence that it was not error to deny the plaintiff's motion for judgment.[65]

The judgment must be reversed, and the cause remanded for a new trial.[66]

[65] The court, however, ordered a new trial on the ground that the finding of fact in the special verdict to the effect that the imprisonment of the plaintiff had ceased before he made the payment to the defendant was wholly unsupported by the evidence.

[66] In Morse v. Woodworth (1892) 155 Mass. 233, 251, 29 N. E. 522, 529, Knowlton, J., for the court, said: "It has sometimes been held that threats of imprisonment, to constitute duress, must be of unlawful imprisonment. But the question is whether the threat is of imprisonment which will be unlawful in reference to the conduct of the threatener, who is seeking to obtain a contract by his threat. Imprisonment that is suffered through the execution of a threat which was made for the purpose of forcing a guilty person to enter

into a contract may be lawful as against the authorities and the public, but unlawful as against the threatener, when considered in reference to his effort to use for his private benefit processes provided for the protection of the public and the punishment of crime. One who has overcome the mind and will of another for his own advantage, under such circumstances, is guilty of a perversion and abuse of laws which were made for another purpose, and he is in no position to claim the advantage of a formal contract obtained in that way, on the ground that the rights of the parties are to be determined by their language and their overt acts, without reference to the influences which moved them. In such a case there is no reason why one should be bound by a contract obtained by force, which in reality is not his, but another's."

In Haynes v. Rudd (1886) 102 N. Y. 372, 7 N. E. 287, 55 Am. Rep. 815, the plaintiff's son had been in the employ of the defendant as clerk, and it was claimed that he had feloniously taken and carried away money from his employer. A criminal prosecution was threatened, and to prevent such prosecution plaintiff gave his note for $250 to the defendant, who transferred it, before it was due, to a purchaser in good faith, to whom the plaintiff was obliged to pay it. Action was brought to recover back the money so paid. The court, per Miller, J., reversing a judgment for plaintiff and ordering a new trial, laid down the rule that: "If the consideration of the note was in any way affected by the compounding of a felony, or it entered into the same, or such a motive actuated the plaintiff, in any respect, then the contract was illegal, and should not be upheld. In such a case the contract was vicious and corrupt, and in violation of law as much as if compounding a felony had been the entire consideration. The element of illegality constituted a part of the contract, thus vitiating the whole, and it could not be rejected because duress, undue influence or threats were also blended with it. * * * We cannot agree with the doctrine that if the plaintiff was influenced by duress of the defendant, and at the same time both parties intended the compounding of a felony, that they were not in pari delicto. It is enough that the vice of compounding a felony was a part of the contract, operating upon the minds of both parties, and thus placing them upon an equality, to render the contract nugatory and of no effect."

But see Schoener v. Lissauer (1887) 107 N. Y. 111, 13 N. E. 741.

Compare State ex rel. Pearson v. Cornell (1898) 54 Neb. 647, 75 N. W. 25.

Duress by Threats of Imprisonment.—"Duress at the common law is of two kinds—duress by imprisonment, and duress by threats. Some of the definitions of duress per minas are not broad enough to include constraint by threats of imprisonment. But it is well settled that threats of unlawful imprisonment may be made the means of duress as well as threats of grievous bodily harm. The rule as to duress per minas has now a broader application than formerly. It is founded on the principle that a contract rests on the free and voluntary action of the minds of the parties meeting in an agreement which is to be binding upon them. If an influence is exerted on one of them of such a kind as to overcome his will, and compel a formal assent to an undertaking when he does not really agree to it, and so to make that appear to be his act which is not his, but another's, imposed on him through fear which deprives him of self-control, there is no contract unless the other deals with him in good faith, in ignorance of the improper influence, and in the belief that he is acting voluntarily. To set aside a contract for duress, it must be shown, first, that the will of one of the parties was overcome, and that he was thus subjected to the power of another, and that the means used to induce him to act were of such a kind as would overcome the mind and will of an ordinary person. It has often been held that threats of civil suits and of ordinary proceedings against property are not enough, because ordinary persons do not cease to act voluntarily on account of such threats. But threats of imprisonment may be so violent and forceful as to have that effect." Morse v. Woodworth, supra.

See, also, Coon v. Metzler (1915) 161 Wis. 328, 154 N. W. 377.

But see Rendleman v. Rendleman (1895) 156 Ill. 568, 41 N. E. 223. ("Threats of imprisonment, for which there is no ground, do not constitute duress, as the person threatened could not be put in fear thereby. Nor do threats of criminal prosecution constitute duress when neither warrant has been issued nor proceedings commenced.") Harmon v. Harmon (1873) 61 Me. 227, 14 Am. Rep. 556.

SMITH v. BLACHLEY.

(Supreme Court of Pennsylvania, 1898. 188 Pa. 550, 41 Atl. 619, 68 Am. St. Rep. 887.)

Assumpsit to recover money had and received. Before McClung, J.

After plaintiff's evidence was all in the trial court entered a compulsory nonsuit which it refused to take off. Plaintiffs appeal.

DEAN, J.[67] Blachley, the defendant, a physician, practiced his profession in the years 1888 and 1889 in Morris township, Washington county. In the adjoining township lived Joseph Beabout, farmer, his wife, and daughter Alice, the latter a single woman; also, John McCullough, farmer, his wife and son. Blachley was at times called in as a physician to both families, where they lived in the country, about three miles apart, while the physician's office was about five miles from both. In February, 1887, Blachley was called in to attend Alice, the daughter of Beabout, in an illness which he said was the result of a criminal abortion.

About February or March, 1888, after she was restored to health, he called upon McCullough, and soon after upon Beabout, and represented to them that the Humane Society of Pittsburgh was about to institute a criminal prosecution against the members of both families for procuring the abortion, and suggested to them that he was in conference with the agent of the society, and that the matter might through him be hushed up by their paying over to him the sum of $3,000, which he would give to the agent to stop further inquiries. Several interviews were subsequently had, in which the representations were repeated. He dwelt largely on the disgrace which such a prosecution would bring on both families, and further offered to assist them in obtaining the money through a bank in the town of Washington. On the 15th of May following, Beabout and McCullough went to Washington, met Blachley, got the money from the bank, and paid it over to him. He told them the agent of the society had not yet arrived, but, when he came, he (Blachley) would pay the money to him, and take his receipts. Afterwards he advised them frequently to keep quiet concerning the matter; to tell no one; not to employ counsel or advise with others, or trouble might result.

Deterred by this advice and caution, they made no inquiries until a short time before this suit was brought, 16th of November, 1895.

(Mere threats of criminal prosecution do not constitute duress without threats of immediate imprisonment.)

See, also, Sulzner v. Cappeau, Lemley & Miller Co. (1912) 234 Pa. 162, 83 Atl. 103, 39 L. R. A. (N. S.) 421.

In Wilbur v. Blanchard (1912) 22 Idaho, 517, 126 Pac. 1069, the court held that money extorted from plaintiff by defendant by threats of unlawful arrest and imprisonment could not be recovered, if the same was in fact due from plaintiff to defendant. Compare City of Chicago v. Malkan, note page 534, supra.

[67] A portion of the opinion is omitted.

Then McCullough (Beabout having died in the meantime) discovered that no prosecution had been contemplated by the Humane Society, and, so far as could be discovered, it had neither knowledge of nor authority to institute such prosecution; further, that Blachley had pocketed the money, and still retained it; that the whole story narrated by him, from beginning to end, was a tissue of falsehoods, concocted to extort money from them. The plaintiff offered ample evidence tending to establish these facts. As the court below entered a compulsory nonsuit, we must consider them, for the purpose of review, as fully proved.

The defendant, in addition to non assumpsit, pleaded the statute of limitations. The court below sustained the latter plea, saying: "Under the circumstances, their [the plaintiffs'] right of action against Blachley accrued, and the statute of limitations began to run, as soon as the money was paid to him. They cannot be heard to say that he committed a fraud upon them by failing to consummate an arrangement which was in itself a fraud upon the administration of justice. The plaintiffs are the parties who, to maintain their action, are compelled to uncover and invoke the aid of the corrupt agreement. This being the case, they cannot profit by it, either directly, as the foundation of an action, or by using it to toll the statute."

Is this conclusion warranted by the facts? It is the policy of the law to leave parties to an illegal transaction where it finds them, by refusing relief to either party. Assuming, what is not proved, that the crime of abortion was committed, and that those who participated in procuring it were the six members of the two families, and that the parties on the one side to the composition of the crime were the heads of the two families, Beabout and McCullough, where is the other party? Blachley was not the prosecutor, and did not pretend to be. According to his own statement, he was their physician, friend, and adviser. He urged them to stifle the prosecution by paying money to the Humane Society, the pretended prosecutor, the other party to the composition. He was the mere agent of the Beabouts and the McCulloughs. Assume, then, as plaintiffs allege and defendant admits, he was their agent to carry the money to the society; and assume, further, that he was lying all the time to them; that, in fact, there was no such prosecutor; then the offense was impossible of commission, for want of parties. This leaves Blachley in the position of a mere blackmailer, who has extorted money from his patients, from those who confided in him, and whose friend he pretended to be, by falsehoods which operated on their fears, and leaves them in the position of having given money to their agent and supposed friend to be used by him in compounding a crime, that they and their families might be saved from scandal.

What is the policy of the law as to the relation thus assumed by Blachley, the agent, towards these plaintiffs, his principals? It is to exact from such agent the most unflinching fidelity to his principals. It abhors any unfair dealing, treachery, or overreaching. The same

rule governs as between master and servant, client and counsel, physician and patient. The relation is one of trust and confidence. They do not deal at arm's length. The principal is in the power of the agent. He is helpless against wrong. May this confidant, by falsehood, entrap his principal into an illegal intent, get possession of his property or money, and then claim exemption from restitution by pleading that his principals intended an illegal act? We can conceive of nothing more destructive of morals in these relations than to hold such a rule applicable to the facts of the case before us. Such an application would be a license to agents and those occupying confidential relations to plunder their principals.

We have no authority in this state directly to the point one way or the other. Quite a number in other states and in England sustain the view we have taken. In Evans v. Trenton, 24 N. J. Law, 764, Evans had been treasurer of the city. He sought to retain $500 of the city's money in addition to his salary, out of a fund realized from the issue of currency to raise funds for the city. The extra services were performed in this transaction, which was in violation of the banking laws of the state. When suit was brought against him, he set up the illegality of the transaction as a defense. The court held: "The mere agent to an illegal transaction cannot set up the illegality of the transaction in a suit by his principal to recover money that has been paid to such agent for his principal on account of the illegal transaction. This defense can only be set up by a party to the illegal transaction." [68] * * *

In Wood, Mast. & S. § 202, this is the text: "While the courts will not enforce an illegal contract, yet if a servant or agent of another has, in the prosecution of an illegal enterprise for his master, received money or other property belonging to the master, he is bound to turn it over to him, and cannot shield himself from liability therefor, upon the ground of the illegality of the original transaction."

There are numerous authorities to the same effect. If, then, the agent cannot successfully set up the unlawful contract to enable him to hold money received from another, for his principal, much less can he set up a pretended illegal transaction to retain money extorted from his principals by the grossest falsehood to further the mythical illegal transaction. The money still belongs to the principal, and he can rightfully demand it as soon as he discovers the fraudulent conduct of his agent.

It is argued that, even if no crime was actually committed by plaintiffs, yet there was an intent to commit one when they paid the money to Blachley, and hence, even if their agent defrauded them, they cannot recover it back. As we have noticed, the intended crime was an impossible one. When conduct susceptible of two constructions is proved, the intent often determines its criminality; but an intent not car-

[68] The court here discussed Baldwin v. Potter (1874) 46 Vt. 402. The case is summarized in a note, page 310, supra.

ried out by an act, or which is impossible of execution by an act, is not punishable. The law takes no cognizance of an intent existing only in the mind, nor does it impose, as a penalty for such intent, immunity to him who has plundered one guilty of it. "The illegal intention must be accompanied by an act which is criminal or prohibited by law, in order to make the transaction illegal." 1 Bish. Cr. Law, sec. 204 et seq.

As to the plea of the statute of limitations, it will not screen defendant from liability if the suits were brought within six years of the discovery of the fraud. There was ample evidence, if believed by the jury, that defendant had, by systematic falsehood and artifice, not only concealed the fraud, but for a long time had deterred his employers from inquiry. Under such circumstances, the plea will not avail him.

The judgment is reversed, and a procedendo awarded.

CHAPTER VI

WAIVER OF TORT[1]

ARRIS v. STUKELY.

(Court of Exchequer, 1677. 2 Mod. 260.)

This case is printed at page 14, supra.

LAMINE v. DORRELL.

(Court of King's Bench, 1705. 2 Ld. Raym. 1216.)

This case is printed at page 15, supra.

HAMBLY v. TROTT.

(Court of King's Bench, 1776. 1 Cowp. 371.)

Trover against an administrator cum testamento annexo for the conversion by the testator in his lifetime of certain sheep, goats, pigs, oats and cyder, the property of the plaintiff. Plea that the testator was not guilty. Verdict for plaintiff.

Mr. Kerby moved in arrest of judgment upon the ground of this being a personal tort which dies with the person, and had a rule to show cause.

Mr. Buller, last term, shewed cause.

LORD MANSFIELD, C. J.[2] The fundamental point to be considered in this case is, whether if a man gets the property of another into his hands it may be recovered against his executors in the form of an action of trover, where there is an action against the executors in another form. It is merely a distinction whether the relief shall be in this form or that. Suppose the testator had sold the sheep, &c., in question: In that case, an action for money had and received would lie. Suppose

[1] "If a man's goods are taken by an act of trespass, and are subsequently sold by the trespasser, and turned into money, he may maintain trespass for the forcible injury; or, waiving the force, he may maintain trover for the wrong; or, waiving the tort altogether, he may sue for money had and received." Pollock, C. B., in Rogers v. Maw (1846) 15 M. & W. 444, 448.

[2] A short statement of the case has been substituted and the arguments of counsel and the brief opinions of Ashurst and Aston, JJ., together with one by Lord Mansfield delivered at the time of the second argument, have been omitted.

the testator had left them in specie to the executors, the conversion must have been laid against the executors. There is no difficulty as to the administration of the assets, because they are not the testator's own property. Suppose the testator had consumed them, and had eaten the sheep; what action would have lain then? Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie, if there is no other remedy for the right.

Upon a second argument.

Cur. advisare vult.

Afterwards, on Monday, February 12th, in this term, LORD MANSFIELD delivered the unanimous opinion of the court as follows:

This was an action of trover against an administrator, with the will annexed. The trover and conversion were both charged to have been committed by the testator in his life-time: The plea pleaded was, that the testator was not guilty. A verdict was found for the plaintiffs, and a motion has been made in arrest of judgment, because this is a tort, for which an executor or administrator is not liable to answer.

The maxim, "actio personalis moritur cum persona," upon which the objection is founded, not being generally true, and much less universally so, leaves the law undefined as to the kind of personal actions which die with the person, or survive against the executor.

An action of trover being in form a fiction, and in substance founded on property, for the equitable purpose of recovering the value of the plaintiff's specific property, used and enjoyed by the defendant; if no other action could be brought against the executor, it seems unjust and inconvenient, that the testator's assets should not be liable for the value of what belonged to another man, which the testator had reaped the benefit of.

We therefore thought the matter well deserved consideration: We have carefully looked into all the cases upon the subject. To state and go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think these conclusions may be drawn from them.

First, as to actions which survive against an executor, or die with the person, on account of the cause of action. Secondly, as to actions which survive against an executor, or die with the person, on account of the form of action.

As to the first; where the cause of action is money due, or a contract to be performed, gain or acquisition of the testator, by the work and labor, or property of another, or a promise of the testator express or implied; where these are the causes of action the action survives against the executor. But where the cause of action is a tort, or arises ex delicto as is said in Hole v. Blandford, T. Raym. 57, supposed to be by force and against the king's peace, there the action dies; as battery, false imprisonment, trespass, words, nuisance, obstructing lights, diverting a water course, escape against the sheriff and many other cases of the like kind.

Secondly, as to those which survive or die, in respect of the form of action. In some actions the defendant could have waged his law; and therefore, no action in that form lies against an executor. But now, other actions are substituted in their room upon the very same cause, which do survive and lie against the executor. No action where in form the declaration must be quare vi et armis, et contra pacem, or where the plea must be, as in this case, that the testator was not guilty, can lie against the executor. Upon the face of the record, the cause of action arises ex delicto; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

But in most, if not in all the cases, where trover lies against the testator, another action might be brought against the executor, which would answer the purpose. An action on the custom of the realm against a common carrier, is for a tort and supposed crime: The plea is not guilty; therefore, it will not lie against an executor. But assumpsit, which is another action for the same cause, will lie. So if a man take a horse from another, and bring him back again; an action of trespass will not lie against his executor, though it would against him; but an action for the use and hire of the horse will lie against the executor.

There is a case in T. Raym. 71, which sets this matter in a clear light: There, in an action upon the case, the plaintiff declared, "that he was possessed of a cow, which he delivered to the testator, Richard Bailey, in his life-time, to keep the same for the use of him the plaintiff; which cow the said Richard afterwards sold, and did convert and dispose of the money to his own use; and that neither the said Richard, in his life, nor the defendant after his death, ever paid the said money." Upon this state of the case, no one can doubt but the executor was liable for the value. But the special injury charged obliged him to plead, that the testator was not guilty. The jury found him guilty. It was moved in arrest of judgment, because this is a tort for which the executor is not liable to answer, but moritur cum persona. For the plaintiff it was insisted, that though an executor is not chargeable for a mis-feasance, yet for a nonfeasance he is: as for non-payment of money levied upon a fieri facias, and cited Cro. Car. 539, 9 Coke, 50b, where this very difference was agreed; for non-feasance shall never be vi et armis, nor contra pacem: But notwithstanding this, the court held "it was a tort, and that the executor ought not to be chargeable." Sir Thomas Raymond adds: "Vide Saville, 40, a difference taken." That was the case of Sir Henry Sherrington, who had cut down trees upon the queen's land, and converted them to his own use in his life-time. Upon an information against his widow, after his decease, Manwood, J., said: "In every case where any price or value is set upon the thing in which the offence is committed, if the defendant dies, his executor shall be chargeable; but where the action is for damages only, in satisfaction of the injury done, there his executor shall not be liable." These are the words Sir Thomas Raymond refers to.

Here therefore is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c. there, the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall.

So far as the tort itself goes, an executor shall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but so far as the act of the offender is beneficial, his assets ought to be answerable; and his executor therefore shall be charged.

There are express authorities, that trover and conversion does not lie against the executor: I mean, where the conversion is by the testator. W. Jones, 173, 174; Palmer, 330. There is no saying that it does.

The form of the plea is decisive, viz. that the testator was not guilty; and the issue is to try the guilt of the testator. And no mischief is done; for so far as the cause of action does not arise ex delicto, or ex maleficio of the testator, but is founded in a duty, which the testator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, as an action for money had and received. Therefore, we are all of opinion that the judgment must be arrested.

PER CURIAM. Judgment arrested.[3]

[3] SURVIVAL OF QUASI CONTRACTUAL CLAIMS.—The principle of survivorship, which applies generally to quasi contractual obligations wherever there is an enrichment of the decedent's estate, constitutes an important distinction between Quasi Contract and Tort. This principle is exemplified by the following cases:

Powell v. Reese (1837) 7 Ad. & El. 426. (Assumpsit lies against administrator for the money received by the intestate upon the sale of coal tortiously mined on plaintiff's land.)

Perkinson v. Guilford (1640) Croke Car. 539. (Debt lies against the executor of a sheriff for the amount collected on a levy by such sheriff.)

Sollers v. Lawrence (1743) Willis, 413. (Debt lies on a judgment against an executor which judgment was based on a statutory obligation resting on the testator to pay a certain sum toward the rebuilding of a parsonage, which was "demolished by the late dreadful fire.")

Patton v. Brady (1902) 184 U. S. 608, 614, 22 Sup. Ct. 493, 46 L. Ed. 713. (The cause of action against a collector of taxes, to recover taxes wrongfully assessed and paid under protest to avoid a threatened seizure and sale of plaintiff's goods, survives against the legal representative of the collector. "If a party increased his own estate by wrongfully taking another's property an action against him would survive his death, and might be revived against his personal representative.")

For an early instance of survivorship of a quasi contractual claim based on unjust enrichment, see Core's Case (1573) Dyer, 20a (briefly stated in note, page 12, supra).

See also Head v. Porter (C. C. 1895) 70 Fed. 498; Ferrill v. Mooney (1870) 33 Tex. 219.

PHILLIPS v. HOMFRAY.

(Court of Appeal, 1883. 24 Ch. Div. 439.)

Messrs. Homfray, Fothergill and Forman, who owned a coal mine adjoining the plaintiffs' farm, not only abstracted minerals from underneath the farm of plaintiffs, but also used certain underground roads and passages constructed by them under plaintiff's land to remove to the surface minerals mined on their own land. Plaintiffs instituted a suit in equity seeking an accounting of the value of the minerals abstracted from their land, and also praying that the defendants might be decreed to pay a wayleave rent or compensation in respect of their user of such roads and passages under plaintiff's land. Pending the trial of the case, Forman and Fothergill, two of the defendants, died, and the suit was revived against their several executors. One of such executors moved to stay all proceedings upon an enquiry which had been directed by the court, in so far as such enquiry was concerned with the amount of minerals of the defendants that had been conveyed to the surface through the roads or passages under plaintiff's farm, and the reasonable value which should be paid to plaintiffs as wayleave or royalty for the use of such underground passages. Pearson, J., having declined to stay these enquiries, the present appeal was taken.

BOWEN, L. J.,[4] delivered the opinion of LORD JUSTICE COTTON and himself.

* * * The plaintiffs' claim out of which the 2nd and 3rd inquiries spring is a claim to be compensated for the secret and tortious use made by the deceased R. Fothergill and others during his lifetime of the underground ways and passages under the Plaintiffs' farm for the purpose of conveying the coal and ironstone of R. Fothergill and his cotrespassers. The judgment of Mr. Justice Pearson as to these two inquiries is based upon the view that this description of claim did not abate upon R. Fothergill's death, but was capable of being prosecuted against the assets in the hands of his executrix. * * *

The only cases in which, apart from questions of breach of contract, express or implied, a remedy for a wrongful act can be pursued against the estate of a deceased person who has done the act, appear to us to be those in which property, or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his own estate or moneys. In such cases, whatever the original form of action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance. In such cases the action, though arising out of a wrongful

[4] The case has been much condensed, mainly by omitting the opinion of Pearson, J., the arguments of counsel and the elaborate discussions of Hambly v. Trott (printed at page 573, supra) contained in the opinions of Bowen and Baggalley, L. JJ. The student will be well repaid by reading the entire report of this important case.

act, does not die with the person. The property or the proceeds or value which, in the lifetime of the wrongdoer, could have been recovered from him can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every wrongful act by which a wrongdoer indirectly benefits that falls under this head, if the benefit does not consist in the acquisition of property, or its proceeds or value. Where there is nothing among the assets of the deceased that in law or equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain, the executors of a wrongdoer cannot be sued merely because it was worth the wrongdoer's while to commit the act which is complained of, and an indirect benefit may have been reaped thereby. * * * This line of demarcation has drawn itself in conformity with the classifications of forms of action known to the English law. As long as the maxim actio personalis moritur cum persona is preserved by the law of this country, the line drawn is neither inconvenient nor unreasonable. If every wrongful act which was attended consequentially and indirectly with advantage to the wrongdoer or his pocket were to warrant an action against executors, it would be impossible to know when executors were liable or not, and the maxim would, in fact, become a mere source of litigation. We have not now to consider the policy of the maxim. It is part of the law, and while it is so, ought not to be frittered away.

The judgment, however, of Mr. Justice Pearson is based upon certain dicta of Lord Mansfield in Hambly v. Trott, 1 Cowp. 374, which are in form ambiguous, and it is necessary accordingly to examine these dicta with reference to the history of the maxim actio personalis moritur cum persona.[5] * * * It seems to us that Lord Mansfield does no more than indicate that there is a class of cases in which assumpsit can be brought against a wrongdoer to recover the property he has taken or its proceeds or value, and that in such cases the action will survive against the executor. * * * If so, the true test to be applied in the present case is whether the plaintiffs' claim against the deceased R. Fothergill, in respect of which inquiries 2 and 3 were directed in his lifetime, belongs to the category of actions ex delicto, or whether any form of action against the executors of the deceased, or the deceased man in his lifetime, can be based upon any implied contract or duty. In other words, could the plaintiffs have sued the deceased at law in any form of action in which "Not guilty" would not be the proper plea? If such alternative form of action could be conceived it must be either an action for the use, by the plaintiffs' permission, of the plaintiffs' roads and passages, similar in principle, though not identical, with an action for the use and occupation of the plaintiffs' land. Or it must be in the shape of an action for money had and received, based upon the supposition that funds are in the hands of the executors which properly belong in law or in equity to the plaintiffs. We do not believe that the principle of waiving a tort and suing in contract can be carried further

[5] The discussion of Hambly v. Trott and the cases therein cited is omitted.

than this—that a plaintiff is entitled, if he chooses it, to abstain from treating as a wrong the acts of the defendant in cases where, independently of the question of wrong, the plaintiff could make a case for relief. There have been, no doubt, instances in which, nothing further appearing in evidence but that one person is the owner of land and that another had taken possession of and enjoyed it, an action for use and occupation under the statute has been upheld. See Hellier v. Sillcox, 19 L. J. (Q. B.) 295. In such cases the inference, in the absence of proof to the contrary, has been allowed to be drawn, that the enjoyment was by permission of the rightful owner. On a somewhat similar principle an action by the lord of a market for stallage was held maintainable against a person who fixed a stall in the soil without leave or license. The authority of this latter case has been questioned, see Turner v. Cameron's Coalbrook Steam Coal Company, 5 Ex. 932; and actions for use and occupation, according to the better opinion, have been confined to the class of cases where defendant is not a trespasser setting up an adverse title, and where there are no circumstances that negative the implication of a contract: see Churchward v. Ford, 2 H. & N. 446, per Pollock, C. B.; Birch v. Wright, 1 T. R. 378. No doubt the mere enjoyment by one man of another man's property, real or personal, may be had under such circumstances as leave still open, as a reasonable inference, the presumption that it is taken on the terms of payment, just as a man who takes a bun from the refreshment counter at a railway station, takes it on the implied promise to pay for it. So actions of assumpsit have been held to lie for the rents of land improperly received under pretence of title. See Bacon's Abridgment, Assumpsit 7th Ed. vol. 1, p. 336; Clarence v. Marshall, per Bayley, B., 2 C. & M. 495.

One of the most remarkable instances of waiver of a tort is to be found in the case of Lightly v. Clouston, 1 Taunt. 112, where the master of an apprentice who had been seduced from his service to work for another person was held justified in waiving the tort and bringing an action of indebitatus assumpsit for work and labour done against the tortfeasor. Lord Mansfield, in deciding the case, referred to the cases of wrongful sale of goods, where, if the rightful owner chooses to sue for the produce of the sale, he may do it, the practice being an advantage and not a disadvantage to the defendant. The case was decided upon the ground that the labour of the apprentice belonged to his master, who might insist on an equivalent for it, or at all events, that the apprentice could not contract for the benefit of anybody except his rightful owner (see per Lord Ellenborough in Foster v. Stewart, 3 M. & S. 191). And actions in which the owners of goods wrongfully sold were held entitled to waive the tort, and to recover in assumpsit for the proceeds, had become familiar to the common law as far back as towards the end of the 17th century. See Lamine v. Dorrell, 2 Ld. Raym. 1216.

The difficulties of extending the above principle to the present case appears to us insuperable. The deceased, R. Fothergill, by carrying his

coal and ironstone in secret over the plaintiffs' roads took nothing from the plaintiffs. The circumstances under which he used the road appear to us to negative the idea that he meant to pay for it. Nor have the assets of the deceased defendant been necessarily swollen by what he has done. He saved his estate expense, but he did not bring into it any additional property or value belonging to another person. The case of Kirk v. Todd, 21 Ch. D. 484, 488, seems to us materially in point. There the owners of certain dye-works sued the original defendants for fouling and polluting a brook. It was held that the action would not survive against their executors. The late Master of the Rolls used the following language: "This was an action on a simple tort. It did not appear that the defendant had got any benefit by fouling the plaintiffs' stream, he had only injured the plaintiff. As I understand the rule at common law it was this—you could not sue executors for a wrong committed by their testator for which you could recover only unliquidated damages. That rule has never been altered except by the Act 3 & 4 Will. IV, c. 42, which allowed the executors to be sued in certain cases, but with the limitation that the injury must have been committed not more than six months before the death of the testator. That was not so here; therefore the statute did not apply, and the rule of the common law remained in its simplicity." In every case where one man fouls the flow of water to which another is entitled he probably saves himself expense by doing so. But the benefit to which the Master of the Rolls alludes appears to us to be some beneficial property or value capable of being measured, followed, and recovered.

It remains to be considered whether there is any equitable doctrine which can extend or vary the above rules of the common law. We can see none. An action for account will only, under such circumstances, lie where the defendant has something in his hands representing the plaintiffs' property or the proceeds or value of it. But if there were any such it could be recovered at law as well as in equity. * * *

The appeal of the defendant Mary Fothergill as to inquiries Nos. 2 and 3 will, therefore, be allowed, with costs.

BAGGALLAY, L. J. I regret that, as regards the appeal of Mrs. Fothergill, I have arrived at a conclusion different from that which has been arrived at by the other members of the Court.[6] * * *

It would appear then that the Judges who disposed of Hambly v. Trott, 1 Cowp. 371, were of opinion, first, that the cause of action was such that the executors might have been made liable; secondly, that by reason of the form of the action, the declaration being in trover, and the plea that the testator was not guilty, it could not be maintained against the executors; and thirdly, and notwithstanding the arrest of judgment in the pending action, another form of action might be brought and maintained against the executors. It is to my mind clear that the Judges were of opinion that the merits were with the plaintiff,

[6] The discussion of Hambly v. Trott is omitted.

but that they were precluded by the technicalities of the pleadings from giving him that to which they deemed him morally entitled. * * *

Upwards of 100 years have elapsed since this judgment in Hambly v. Trott, 1 Cowp. 371, was delivered. It has ever since been regarded as an accurate representation of the state of the law as affecting executors in respect of causes of action and forms of action arising out of the acts of their testators. * * * It has hardly been disputed on the present appeal that a remedy for a wrongful act can be pursued against the estate of a deceased person by whom the act has been committed, when property, or the proceeds of property, belonging to another have been appropriated by the deceased person, in other words that the action in such cases, though arising out of a wrongful act, does not die with the person; but it has been urged that the principle thus enunciated is limited to cases in which property, or the proceeds of property, have been appropriated by the deceased person, and that it does not apply to a case in which the deceased person has derived any other benefit from his wrongdoing, than property or the proceeds of property, and in particular that it does not apply to a case in which the benefit derived has not been in the form of an actual acquisition of property, but of a saving of expenditure which must otherwise have been incurred by the wrongdoer, as in the present case, in which, for the purpose of the present argument, it must be assumed that by the use by the defendants, for the carriage of their minerals, of the roads and passages under the plaintiffs' farm, there was a saving to them of an expenditure which they must otherwise have incurred.

Speaking with much diffidence, as my views in this respect differ from those of my colleagues, I feel bound to say that I cannot appreciate the reasons upon which it is insisted that although executors are bound to account for any accretions to the property of their testator derived directly from his wrongful act, they are not liable for the amount or value of any other benefit which may be derived by his estate from or by reason of such wrongful act. I can find nothing in the language used by Lord Mansfield that can support this view. On the contrary, when classifying the actions which survive against an executor by reason of the causes of action, he includes among such causes of action "gain or acquisition by the testator by the work and labour or property of another," and he in no respect limits or qualifies the nature or character of the "gain" referred to. A gain or acquisition to the wrongdoer by the work and labour of another does not necessarily, if it does at all, imply a diminution of the property of such other person. Whether the amount of the wayleave which a person could reasonably be called upon to pay for the use for the carriage of his minerals over the roads of another, would be a fair measure of the gain or acquisition to the property of the person who has so used them without paying any wayleave, is a question which it is not necessary to decide.

I entertain no doubt as to there being ample means of ascertaining the amount of gain or acquisition to the property of a person so using

the roads of another. That Lord Mansfield did not intend to limit the generality of the rule enunciated by him in the manner suggested is, I think, clear from the following observations made by him in the course of the first argument in Hambly v. Trott, 1 Cowp. 373: "Suppose the testator had sold the sheep, &c., in question. In that case an action for money had and received would lie. Suppose the testator had left them in specie to the executors, the conversion must have been laid against the executors. Suppose the testator had consumed them and had eaten the sheep, what action would have lain there? Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie if there is no other remedy for the right." It appears to me clear that in the opinion of Lord Mansfield the injured owner of the sheep was equally entitled to redress against the estate of the wrongdoer, whether the sheep were sold by him, or were consumed by him, or were left by him in specie at his death. Now, if the sheep had been consumed by the testator, the only accretion to his property derived from his so doing would have been the amount of the saving in his butcher's bill and I am unable to appreciate the distinction in principle between adding to his property by savings in the amount of his butcher's bills and by savings in the cost of carrying his minerals. * * *

For these reasons the appeal of Mrs. Fothergill ought, in my opinion, to be dismissed.[7]

LIGHTLY v. CLOUSTON.

(Court of Common Pleas, 1808. 1 Taunt. 112.)

This was an action of indebitatus assumpsit "for work and labor performed for the defendant at his request, by one Thomas Sinclair, the apprentice of the plaintiff legally bound to him by indenture, for a term of years at the time of the work and labour so performed existing and unexpired, and to the profits and receipts of whose work and labour the plaintiff was, as the master of the said apprentice, by law entitled." The defendant seduced the apprentice from on board the plaintiff's ship in Jamaica, and employed him as a mariner to assist in navigating his own ship from Port Royal home. The cause was tried at the sittings after Trinity term last before Mansfield, Ch. J. The jury found a verdict for the plaintiff, subject to the opinion of the court on the following objection, namely, that the plaintiff ought to have declared in a special action on the case, and that indebitatus assumpsit would not lie.

[7] The doctrine of Phillips v. Homfray was followed in Payne's Appeal (1895) 65 Conn. 397, 32 Atl. 948, 33 L. R. A. 418, 48 Am. St. Rep. 215. The view advanced in the dissenting opinion is approved by text writers (Keener, Quasi Contracts, 163 et seq.; Woodward Quasi Contracts, § 274), and has the direct support of some authority (Sollers v. Lawrence [1743], Willes, 413; Ferrill v. Mooney [1870] 33 Tex. 219), as well as the indirect support of many of the other cases in the present chapter.

MANSFIELD, C. J. It is difficult upon principle to distinguish this case from those that have arisen on bankruptcies and executions, and in which it has been held that trover may be converted into an action for money had and received, to recover the sum produced by the sale of the goods. I should much doubt the case of Smith v. Hodson [4 Term R. 217], but that I remember a case so long back as the time of Lord Chief Justice Eyre in the reign of George the Second, in which the same thing was held. I should have thought it better for the law to have kept its course: but it has now been long settled, that in cases of sale, if the plaintiff chuses to sue for the produce of that sale, he may do it: and the practice is beneficial to the defendant, because a jury may give in damages for the tort a much greater sum than the value of the goods. In the present case the defendant wrongfully acquires the labour of the apprentice; and the master may bring his action for the seduction. But he may also waive his right to recover damages for the tort, and may say that he is entitled to the labour of his apprentice, that he is consequently entitled to an equivalent for that labour, which has been bestowed in the service of the defendant. It is not competent for the defendant to answer, that he obtained that labour, not by contract with the master, but by wrong; and that therefore he will not pay for it. This case approaches as nearly as possible to the case where goods are sold, and the money has found its way into the pocket of the Defendant.

HEATH, J. So long back as the time of Charles the Second it was held that the title to an office, under an adverse possession, might be tried in an action for the fees of the office had and received; and Holt, Ch. J., held it clear law, that if a person goes and receives my rents from my tenants, I may bring my action against him for money had and received. It is for the benefit of the Defendant that this form of action should be allowed to prevail, for it admits of a set-off, and deductions, which could not be allowed in an action framed on the tort.

Rule discharged.[8]

[8] Accord: Munsey v. Goodwin (1825) 3 N. H. 272.

A parent may recover in indebitatus assumpsit for the value of the services of his minor child from one who knowingly employs the child without the consent of the parent (but defendant may offset the value of necessaries furnished the child). Culberson v. Alabama Construction Co. (1907) 127 Ga. 599, 56 S. E. 765, 9 L. R. A. (N. S.) 411, 9 Ann. Cas. 507. The mother of a bastard child was allowed the same right in Illinois Central R. Co. v. Sanders (1913) 104 Miss. 257, 61 South. 309, 44 L. R. A. (N. S.) 1137.

See also Stockett v. Watkins (1830) 2 Gill & J. (Md.) 326, 20 Am. Dec. 438, page 600, infra.

PATTERSON v. PRIOR.

(Supreme Court of Indiana, 1862. 18 Ind. 440, 81 Am. Dec. 367.)

Appeal from the Clark Circuit Court.

WORDEN, J. Suit by Prior against the appellants, for work and labor. Judgment for the plaintiff.

The defendants pleaded separately the general denial, and some special defences, to the latter of which demurrers were sustained. We deem it unnecessary to examine the special answers, as it seems to us that the substantial facts thus set up could have been given in evidence under the general denial. The cause was submitted to the Court for trial on the following agreed statement of the facts, which was all the evidence given in the cause, viz.:

"It is agreed in this case, that the plaintiff, said James Prior, was imprisoned in the State Prison, in the custody of said Miller, as warden thereof, under and by virtue of a judgment of the Court of Common Pleas of Vanderburgh county, a certified copy of which judgment is filed with defendant's answer. That during his confinement he did work and labor as a criminal; said work and labor were of the value of 225 dollars; said Patterson, during all the time of said Prior's confinement in said State Prison, was the lessee thereof, and said work and labor were done by the order of said Miller, and said Patterson received all the benefit of said labor as such lessee. The time of said Prior's confinement commenced on the 12th of September, 1853, and he was discharged therefrom, and ordered to be returned to the sheriff of Vanderburgh county upon a writ of habeas corpus, by him sued out on the first day of January, 1855."

The question as to the sufficiency of the evidence to sustain the finding was properly presented on a motion for a new trial.

The appellants assign errors separately.

At the time the appellee was convicted and sent to the penitentiary, the Court of Common Pleas had no jurisdiction in that behalf; hence, the conviction and judgment were nullities, and furnish the appellants no protection for the tort committed in confining him in the penitentiary. Patterson v. Crawford, 12 Ind. 241. The appellants must be presumed to have known the law, and that they had no legal right to imprison the appellee, or cause him to labor. That they may have been responsible to him in some form can not be doubted. They undoubtedly committed a tort, and the question here is, whether the tort can be waived, and an action maintained on an implied assumpsit?

We will first examine this question so far as it relates to Patterson. He, it seems, was the lessee of the penitentiary, and received all the benefit of the appellant's labor. He must be presumed to have assented to the performance of the labor, and being benefitted thereby, the law implies a promise to pay what it is reasonably worth. It was held in Patterson v. Crawford, supra, that where labor is performed for

the benefit of a party without an express contract, if he knows it, and tacitly assents to it, he will be liable on an implied contract to pay a reasonable compensation therefor. In our opinion, so far as Patterson is concerned, the tort may be waived, and an action be maintained on the implied assumpsit. The case, however, is entirely different as to Miller, the warden of the penitentiary. He received no benefit of the plaintiff's labor, and not having been benefitted, there is, as to him, no consideration to support an implied assumpsit to pay. The case of Webster et al. v. Drinkwater, 5 Greenl. (Me.) 319, 17 Am. Dec. 238, is much in point, where it was held, that the party committing a tort can not be charged as upon an implied contract, the tort being waived, unless some benefit has actually accrued to him.[9]

PER CURIAM. The judgment against Miller is reversed, and against Patterson it is affirmed. Costs to be apportioned between Patterson, and Prior, the appellee.[10]

REYNOLDS BROS. v. PADGETT.

(Supreme Court of Georgia, 1894. 94 Ga. 347, 21 S. E. 570.)

Petition for certiorari, Appling county; J. L. Sweat, Judge.

Action by Reynolds Bros. against E. P. Padgett on an implied contract. Defendant had judgment, and plaintiffs bring certiorari.

SIMMONS, J. All the authorities agree that one who takes and sells personal property belonging to another without the consent of the owner is liable for its value in an action upon an implied promise to pay for the property. The authorities differ as to whether such an action will lie where the person taking the property does not sell it, but retains it for his own use; but the weight of authority seems to be that the action will lie where the person who takes the property enriches himself or makes a profit from the property, either by selling it, or by retaining it and using it himself, with the intention to convert it permanently. Pom. Code Rem. §§ 567, 569, and notes. The defendant in this case did neither of these things. He found the wagon in the street, and hitched his horses to it, for the purpose of going upon a fishing excursion for one day; but, upon starting to go, the tongue of the wagon was broken by one of the horses, and he unhitched the horses, and left it in the street. It was finally carried to his lot, and left

[9] "Where there are two or more joint tort-feasors, and the tort be waived, the action for money had and received for the use and benefit of the plaintiff cannot be sustained as to the tort-feasor who did not receive any benefit arising from the conversion. In waiving the tort and suing in this action there is a ratification of the contract of sale which constituted the conversion, and the suit can only be maintained against him or those who received the proceeds of such sale or received the benefits of the same." Ward v. Hood (1899) 124 Ala. 570, 27 South. 245, 82 Am. St. Rep. 205.

[10] Accord: Tennessee Coal, Iron & R. Co. v. Butler (1914) 187 Ala. 51, 65 South. 804.

Compare Hickam v. Hickam (1891) 46 Mo. App. 496, stated briefly in note page 436, supra.

there, but there is no evidence that he ever made any claim to the wagon or any further use of it, nor was anything further proven tending to show that he intended to convert it permanently to his own use. On the contrary, the indications are that he was holding it for the use of the owner.

We, therefore, think the trial judge was right in holding that an action upon an implied contract would not lie, but that the plaintiff must sue in tort for the damage to his property. Judgment affirmed.[11]

WESTERN ASSURANCE COMPANY v. TOWLE.

(Supreme Court of Wisconsin, 1886. 65 Wis. 247, 26 N. W. 104.)

Appeal from circuit court, Outagamie county.

TAYLOR, J.[12] This action was brought by the insurance company to recover from the appellant and Swan about $1,000, which the company had paid to them upon a policy of fire insurance issued by said company to Towle & Swan as partners, upon an alleged loss by fire of property covered by said policy. The complaint charges that the payment of the $1,000 was procured by the defendants from the company by making false and fraudulent proofs of loss and by false swearing on the part of the defendants, Towle & Swan, as to the extent of their losses; and that, relying upon such false statements and proofs of loss, and not knowing of their falsity at the time, the plaintiff paid the $1,000 to the defendants; that afterwards, upon ascertaining the falsity of their statements and proofs of loss, and that they did not in fact sustain the losses claimed by them, and that there was in fact but a very small portion of said $1,000 due to them for losses under said policy, the plaintiff demanded of said

[11] Accord: Fanson v. Linsley (1878) 20 Kan. 235; Tightmeyer v. Mongold (1878) 20 Kan. 90. In the latter case cattle belonging to the defendant (who was the plaintiff in error) trespassed upon and damaged plaintiff's crops. Horton, C. J., speaking for the court, said: "In our examination of authorities, we have found no case supporting the theory of the court below, that where damages have been committed by one's cattle to the crops or personal property of another without the owner's participation in the trespass, or benefit therefrom, and in the absence of any promise, that the party injured in his property could waive the tort and recover his damages in an action on contract. That is this case. Therefore, when it appeared that the items in the account of Mongold charged as 'potato crop' and 'shocks of corn-fodder' were for damages done to his potatoes and corn by the stock of the plaintiff in error, and no promise to pay for the damage was shown, nor any participation by plaintiff in error in the trespass, or benefit to him, the district court should have sustained the objection to the evidence as irrelevant and incompetent. Its failure to do so was error. If the plaintiff in error had committed a willful trespass upon the land of the defendant in error by deliberately turning his stock thereon, in order that they might feed upon the potatoes and corn-fodder, the defendant in error, within the rule adopted in Wisconsin, might have waived the tort and sued upon an implied contract for the price and value of his potatoes and fodder. This proof was not made, and this case is not within that decision."

[12] Portions of the opinion are omitted.

defendants the $1,000 so paid to them by reason of said false and untrue proofs of loss and fraudulent representations; that the defendants have neglected and refused to pay the same. Judgment is demanded for the said sum of $1,000 with interest from the twenty-seventh day of September, 1881, that being the date of the payment thereof to them by the company. * * *

The provisions in the policy in regard to fraudulent overestimates of the loss, or false swearing as to the extent of the loss, working a forfeiture of their right to recover anything upon the policy, do not effect the rights of the plaintiff in this action to recover back money paid on the policy, nor enlarge its rights beyond what they would have been had no such provision been found in the policy. False swearing and false valuation in proofs of loss might have been a good defense to a recovery upon the policy had the plaintiff refused to pay the loss; but it cannot be made the basis of a right to recover back money already paid upon the policy. The plaintiff's right to recover depends upon proof establishing the fact that the company has paid more money than covered the loss sustained by the defendants, and that such payment was procured by the false and fraudulent acts of the defendants. This action for money had and received to the plaintiff's use is in no way founded upon the contract of insurance, but upon the fact that false and fraudulent representations were made by the defendants in order to induce the plaintiff to pay the same. This was so expressly held in Northwestern Life Ins. Co. v. Elliott (C. C.) 5 Fed. 225. * * *

The plaintiff in the case at bar, in order to avail itself of the right to sue out an attachment in this action, elected to waive the action for the wrong committed by the defendants, and bring their action for money had and received to its use, upon the implied assumpsit to repay the same. In this action it recovers the money, if it recovers at all, on the ground that it has paid for a loss which did not in fact occur. If the loss did in fact occur, to the extent of the payment made, then in equity and good conscience the money ought not to be refunded, and no promise to refund the same could be presumed in favor of the plaintiff; and if there was a loss, though not as great as the money paid, and the excess of payment was made on account of the fraud of defendants, as to such excess, there would arise an implied promise on the part of the defendants to refund the excess. The fraud consists in falsely overestimating the claim, and demanding and receiving the excess beyond the actual loss, and not in receiving the money which was justly due for a real loss sustained. We think, therefore, that this action for money had and received, which has always been considered an action at law, which is maintainable upon equitable principles, can only avail the plaintiff for the purpose of recovering what it has paid in excess of the real loss, if any, which was sustained by the defendants, unless the jury should find that the fire which de-

stroyed the property was caused, either directly or indirectly, by the wrongful acts of the defendants, or one of them. If the latter fact was made to appear, there would be no loss under the policy which the plaintiff ought to pay. If, on the other hand, there was in fact an honest loss under the policy, and the plaintiff has paid more than such honest loss by reason of the fraud of defendants, that fact does not entitle the plaintiff to recover back in this action the amount of money which is covered by the honest loss. * * *

The learned circuit judge instructed the jury that if they found from the evidence that the loss of defendants was small, and materially less than the amount of the policies of insurance, and that the defendants knew that fact when they made their proofs of loss, and intentionally and knowingly stated the amount of the loss to be materially greater than they knew it to be, for the purpose of unjustly procuring from the plaintiff more than the amount of the loss, and the plaintiff paid the loss, relying upon such proofs, and in ignorance of its falsity, then the jury should find a verdict for the plaintiff for the full sum paid by it, with interest from the date of payment. This instruction was excepted to by the defendant, Towle. As stated above, this instruction was erroneous, and did not state the true rule for establishing the amount the plaintiff should recover in this action upon that branch of the case. As there was only a general verdict in the case, we cannot determine that the verdict was not based upon the fact that there was a fraudulent overvaluation of the amount of the losses of the defendants. This erroneous charge may have induced the jury to render a verdict for the whole sum paid by the plaintiff, notwithstanding they found in favor of the defendant Towle on the charge that the fire was wrongfully set by the defendants, or one of them.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.[13]

BRISTOW v. EASTMAN.

(Nisi Prius, before Lord Kenyon, C. J., 1794. 1 Esp. 172.)

This case is printed at page 23, supra.

[13] See, also, Schank v. Schuchman (1914) 212 N. Y. 352, 106 N. E. 127.

NEATE v. HARDING.

(Court of Exchequer, 1851. 6 Exch. 349.)

Assumpsit for money had and received. Plea, non assumpsit.

At the trial, before Martin, B., at the Wiltshire Spring Assizes, the following facts appeared: The plaintiff's mother had for some time received parochial relief, but there being strong ground for suspecting that her poverty was feigned, and that she was in reality possessed of a considerable sum of money, the defendant Harding, who was assistant overseer of the Clane Union, and the defendant Bowns, one of the Wiltshire county constabulary, went together to her house for the purpose of searching for the money. Bowns remained outside, while Harding entered the house, and having found in a cupboard £163., he took it away with him. The money was afterwards taken to a bank by both the defendants, and paid in to their joint account. It was proved that the money belonged to the plaintiff. On the part of the defendants, it was objected, that under these circumstances the action for money had and received would not lie; and also that there was no evidence of a joint taking by Bowns. The learned Judge overruled the objections, and directed a verdict for the plaintiff, reserving leave for the defendants to move to enter a nonsuit.

POLLOCK, C. B.[14] We all agree that there ought to be no rule. The owner of property wrongfully taken has a right to follow it, and, subject to a change by sale in market overt, treat it as his own, and adopt any act done to it. That doctrine was carried to a great extent in Taylor v. Plumer, 3 M. & Sel. 562, and is fully explained by Lord Ellenborough in delivering the judgment of the Court. In this case the money taken belonged to the plaintiff; and it did not cease to be his money because it was in the defendants' hands; he was therefore at liberty to waive the wrongful act, and treat it as money received by the defendants for his use. The mere presence of the defendant Bowns might not have sufficed to render him liable; but there is evidence that he concurred in placing the money in the bank in the joint names. Rule refused.[15]

MASON v. WAITE.

(Supreme Judicial Court of Massachusetts, 1822. 17 Mass. 560.)

Indebitatus assumpsit for money had and received by the defendant, to the use of the plaintiff. The facts proved at the trial before the chief justice, at the last November term in this county, were, that four or five years previous, one John Sargent was the driver of a stage between Gloucester and Boston, and was accustomed to transact

[14] The concurring opinions of Parke, Platt, and Martin, BB., are omitted.

[15] Accord: Gould v. Baker (1896) 12 Tex. Civ. App. 669, 35 S. W. 708; Howe v. Clancey (1865) 53 Me. 130.

business in Boston for persons living in Gloucester; and particularly in bringing sums of money for them, to be paid according to their directions; that about that time Sargent received of the plaintiff 150 dollars in bank bills, to carry to Boston, which were put up by themselves in a separate parcel, Sargent having at the same time other parcels of money, which he had received for a similar purpose, from other persons in Gloucester; that on his arrival at Boston, he was invited by a young man to go to a house kept by the defendant and another person by the name of Hilton, where a faro bank or table was kept by those two persons; and where, in the course of three or four evenings, he lost the sum of 900 dollars, of money he had received of persons in Gloucester, as above stated; that the defendant and the said Hilton were the persons who won the money, which was actually paid to them; and particularly, that the bills received by Sargent of the plaintiff, as above stated, made part of the $900, which he lost and paid over to the defendant and Hilton. This latter, on application to him, had paid to the plaintiff one half the amount of the money, which Sargent received of him.

Upon these facts the jury were instructed, that the plaintiff was entitled by law to recover seventy-five dollars, with interest from the time the defendant had received it; and they returned their verdict accordingly. The defendant insisted that the action could not be maintained upon these facts; and if such should be the opinion of the Court, the verdict was to be set aside, and the plaintiff become nonsuit; otherwise judgment was to be rendered on the verdict, with additional interest.

PARKER, C. J. The identical bills, paid by Sargent to the defendant, were proved to be the property of the plaintiff. They were committed to Sargent, as a carrier, to pay to the order of the plaintiff. They came into the hands of the defendant unlawfully; for gaming is unlawful by our statute. The defendant could have gained no property in them, even as against Sargent, who might have recovered them back within three months. Any other person might have recovered double the amount, without limitation of time; and the defendant was further liable to indictment. How then can he have a right to retain against the true owner, any more than he would a horse, or any other chattel, acquired in the same way? It is true, in such a case, trover would have been the proper action; and, perhaps, would have been the better action in this case, but for the difficulty of identifying bank notes.

We do not see, however, why the action for money had and received will not lie. The notes were paid and received as money; and as to any want of privity, or any implied promise, the law seems to be, that where one has received the money of another, and has not a right conscientiously to retain it, the law implies a promise that he will pay it over.

Had Sargent paid the money to an innocent person, for a valuable consideration, or to satisfy a debt of his own, the case might have been different; as it would be mischievous to require of persons, who receive money in the way of business, or in payment of debts, to look into the authority of him from whom they receive it.

Judgment on the verdict.[16]

SPAULDING v. KENDRICK.

(Supreme Judicial Court of Massachusetts, 1898. 172 Mass. 71, 51 N. E. 453.)

Bill in equity, by the receiver of the Stockbridge Savings Bank, to recover the sum of five thousand dollars, the property of the bank, alleged to have been misappropriated by one Frederick A. Hobbs, a former receiver of the bank, who had been removed from his office. Trial in the Superior Court, before Lilley, J., who found for the defendant Kendrick, who alone defended; and the plaintiff alleged exceptions.

KNOWLTON, J. The bill alleges that the sum of $5,000 was taken by Hobbs from the funds in his hands as receiver, and sent to William A. Dickinson, of Amherst, in the form of a draft, and by him delivered to one James I. Cooper, who received it as the attorney of the defendant Kendrick, and turned it over to him. The plaintiff discontinued his suit as against all the defendants except Kendrick and Hobbs, and Kendrick alone defends. Kendrick and one Stockbridge were sureties for Hobbs upon a bond given by him as trustee under the will of one Dickinson, in the sum of $8,000, and previously to the receipt of the money Kendrick had filed a petition in the probate court asking to be relieved from further liability on the bond.

We may assume, upon the evidence, that the money belonged to the bank, and was misappropriated by Hobbs. There was evidence to

[16] In Brundred v. Rice (1892) 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589, a railroad company contracted with defendant to charge defendant a certain flat rate for the transportation of oil, and to charge all other shippers twice that amount, and to pay to defendant one-half the sum thus charged to other shippers. Plaintiff, a shipper of oil, having paid the railroad company the greater rate, in ignorance of the agreement between the railroad and defendant, and the railroad having paid defendant a sum equal to one-half thereof, plaintiff now brings indebitatus assumpsit against defendant to recover the sum so received by defendant. The court held for the plaintiff, on the ground that the contract with defendant and the excessive charge to plaintiff were unlawful, and thus since plaintiff's money had come wrongfully into defendant's hands, assumpsit would lie to recover the same; "for the action lies in every instance where one has come into possession of money which should in good conscience be refunded to another."

In Hindmarch v. Hoffman (1889) 127 Pa. 284, 18 Atl. 14, 4 L. R. A. 368, 14 Am. St. Rep. 842, one Savanock stole money from plaintiff and deposited it with defendant (a banker) to be returned to him or upon his order. Before Savanock had withdrawn the money plaintiff notified defendant of the theft and claimed the money. Thereafter defendant paid the money to one who held an order from Savanock. The court held that plaintiff might recover from defendant the amount of the deposit in indebitatus assumpsit.

warrant the finding of the judge that the defendant Kendrick had no knowledge that the money was other than the property of Hobbs, and that he received it through his attorney in good faith, and as security for a liability of greater amount than $5,000, and on account thereof forbore to prosecute his petition for relief as surety on the bond of Hobbs. The evidence warranted a finding that his receipt of it was the same, in legal effect, as if it had been put into his possession by Hobbs with his own hand, to be held as security against loss as surety on the bond. The evidence tended to show that the draft was sent to Mr. Dickinson, to be held and used as such security, and that, if the delivery of it to Mr. Cooper was not expressly authorized by Hobbs, it was within the general purpose of Hobbs, and was soon afterwards known to him and ratified by him.

The law of the case is settled by numerous decisions. If a thief gives stolen money, or negotiable securities before their maturity, in payment of his debt, or as security for it, to one who in good faith receives the money or securities as belonging to him, the creditor can hold the property as against the true owner. As between the payor and the payee there is no mistake which affects the validity of the transaction. One receiving money or negotiable securities in payment of, or as security for, an existing debt, is not bound to inquire where the money or securities were obtained. It is better that money or a negotiable security passing from hand to hand, to one who rightly receives it for a valuable consideration, should carry on its face its own credentials. Insurance Co. v. Abbott, 131 Mass. 397; Bank v. Plimpton, 17 Pick. 159, 28 Am. Dec. 286; Greenfield School Dist. v. First Nat. Bank, 102 Mass. 174; Thacher v. Pray, 113 Mass. 291, 18 Am. Rep. 480; Ex parte Apsey, 3 Brown, Ch. 265; Jaques v. Marquand, 6 Cow. (N. Y.) 497; Dunlap v. Limes, 49 Iowa, 177. See, also, Mason v. Waite, 17 Mass. 560–563; Worcester Co. Bank v. Dorchester & Milton Bank, 10 Cush. 488, 57 Am. Dec. 120. It has often been decided in this commonwealth that a pre-existing debt is a valuable consideration for a payment made, or a security given, on account of it. Blanchard v. Stevens, 3 Cush. 162, 50 Am. Dec. 723; Fisher v. Fisher, 98 Mass. 303; Goodwin v. Trust Co., 152 Mass. 189–199, 25 N. E. 100; Merchants' Nat. Bank of Lowell v. Haverhill Iron Works, 159 Mass. 158, 34 N. E. 93; Bank v. Morse, 163 Mass. 383, 40 N. E. 180.

Exceptions overruled.[17]

[17] Compare Stephens v. Board of Education (1879) 79 N. Y. 183, 35 Am. Rep. 511, supra, page 108.

One who buys a chattel from a converter, however "innocently," is himself a converter (though some courts hold that he is entitled to a demand). Thus (subject, in some jurisdictions, to the rule of Jones v. Hoar, page 595, infra) the true owner may "waive the tort" as against such purchaser and sue in assumpsit, and it is no defence that such purchaser has already made payment to the original wrongdoer. Roberts v. Evans (1872) 43 Cal. 380.

In Knapp v. Hobbs (1871) 50 N. H. 476, an agent to sell, employed by a con-

BROWN v. BROWN.

(Supreme Court of New York, General Term, Third Department, 1886. 40 Hun, 418.)

Appeal from a judgment in favor of the defendant, entered in Columbia county upon the report of a referee.

This case came before the General Term upon the judgment-roll and without the evidence. The referee reported as follows:

First. That prior to and on and for some time after August 27, 1877, the plaintiff and defendant lived together as husband and wife at South Pownal, Vermont.

Second. That while so living together the plaintiff was called by the defendant Annie Brown.

Third. That on the 27th day of August, 1877, the defendant deposited in the Hoosac Savings Bank of North Adams, in the State of Massachusetts, $1,000 to the credit of Annie Brown, but with the understanding with the officers of the bank, that the sum so deposited should be payable to the order of himself.

Fourth. That shortly thereafter the defendant gave to the plaintiff the bank-book issued by said bank and representing such deposit, with intent to transfer and assign to her the indebtedness of said bank on account of such deposit and all control over the same.

Fifth. That said book remained in the possession of the plaintiff, and was held by her as her own until a long time thereafter, when the defendant took the same from the plaintiff by force and against her will.

Sixth. That the plaintiff and defendant thereupon separated and did not afterwards live together as husband and wife.

Seventh. That the plaintiff notified the officers of said bank that she was the owner of said book and the moneys represented thereby, and demanded payment of the same to herself, which was refused, whereupon she forbade payment of the same to the defendant.

Eighth. That afterwards said defendant took said book to said bank and surrendered the said book and drew all the moneys and interest due upon the account represented by said book, amounting in the aggregate to $1,077, and took and kept the same to his own use.

As a conclusion of law I find that the defendant is entitled to judgment for his costs therein, which I accordingly direct.

The referee also found, in response to requests of the plaintiff: That the defendant made a valid gift to plaintiff of the book and of the title to the money represented by it. That the bank, upon payment to de-

verter, who had accounted to his principal, was held liable in indebitatus assumpsit to the owner (in this case a mortgagee) of the chattel for the proceeds of the sale.

Contra (on the ground that the agent received no benefit): Greer v. Newland (1904) 70 Kan. 310, 77 Pac. 98, 70 L. R. A. 554, 109 Am. St. Rep. 424.

fendant, retained the book. The referee stated in his opinion, and the fact is implied in the referee's findings upon other requests of the plaintiff, that the rules of the bank required the production of the book as a condition of payment.

LANDON, J. This case was decided in favor of the defendant by the application of the well settled rule, that where two rival claimants demand payment, each in his own right, of the debt which the debtor owes to one of them only, if the debtor pays the wrong claimant, the debt due to the rightful creditor is not thereby affected, and he acquires no title to recover the money of the party who wrongfully claimed and received it. Patrick v. Metcalf, 37 N. Y. 332; Butterworth v. Gould, 41 N. Y. 450.[18] But this rule rests upon the basis that the wrongful claimant obtains the money upon his own independent claim; that in using his own he does not prejudice his competitors; that he does not exercise any right or title of which he has wrongfully divested his competitor; that he is not assuming any agency for him; that he is not in privity with him. Carver v. Creque, 48 N. Y. 385; Peckham v. Van Wagenen, 83 N. Y. 40, 38 Am. Rep. 392; Hathaway v. Town of Cincinnati, 62 N. Y. 434; Bradley v. Root, 5 Paige, 632.

Here the defendant had made an absolute gift of the bank-book, and of the title to demand and receive the money represented by it, to the plaintiff. When the defendant, by force and against the will of the plaintiff, took the bank-book from her, he knew that he had no title to it or the money represented by it. Whatever claim he might assert to the money he well knew rested upon his fraud, if not upon his

[18] In Sergeant & Harris v. Stryker (1838) 16 N. J. Law, 464, 32 Am. Dec. 404, one Jones, a sheriff, offered a reward of $50 for the apprehension of a prisoner who had escaped from jail. Stryker apprehended the prisoner and thus became entitled to the reward, but Sergeant and Harris falsely informed the sheriff that they had taken up the prisoner, and the sheriff thereupon paid them the amount of reward. Held, that an action for money had and received could not be maintained by Stryker against Sergeant and Harris. The court, speaking through Hornblower, C. J., said: "That the sheriff did not pay the money to them [Sergeant and Harris] for Stryker, he expressly testifies; nor did they profess so to receive it; but on the contrary, claimed it as their own. If then the law can raise any implication that the defendants received the money to and for the use of Stryker, it must be on the ground that they practised a fraud on the sheriff. But I cannot well perceive how a fraud on one man, can enure to the benefit of another; or how a fraud practised on the sheriff, can raise a promise to pay money to the plaintiff. If, indeed, the money had been paid to Stryker, and left by him in a bag, or purse, with the sheriff for safe keeping, and the defendants had got possession of it by falsehood and misrepresentation, then it would have been a fraud on the plaintiff: it would have been his money, and he might have pursued it in this form of action. But however unfair towards the sheriff the conduct of the defendants has been, they did not thereby get Stryker's money —they got Jones' money, and ex æquo et bono, they ought not to retain it from him—they are bound by the ties of natural justice and equity, to refund it to him; and in his favour, the law considers it in their hands, as money received by them to his use—not to the use of any other person. The money, that Jones paid to Sergeant and Harris, was no more Stryker's money than it was the money of any other creditor of Jones."

But see, contra, Claxton v. Kay (1912) 101 Ark. 350, 142 S. W. 517, Ann. Cas. 1913E, 972.

crime. But he thus obtained the physical power and apparent authority to represent the plaintiff in the presentation of the book to the bank, and by the act of presenting the book he did represent that whatever title or authority she had in the matter was exercisable by him, and he thus obtained the money.

He can take no advantage from his own wrong, and since he could not, in the absence of any title from the plaintiff, lawfully, as against her, obtain the money except as her agent, he may not, with the proceeds in his pocket, deny that he obtained them in the only manner in which he could lawfully obtain them.

It is probable the plaintiff could have maintained an action against the bank, since the bank had notice of her rights. But it was open to the plaintiff to elect to adopt the acts of the defendant or repudiate them. He shall not be heard to plead his own turpitude, and is therefore estopped to deny that he did not assume to act as the agent of the plaintiff. She may waive the tort, adopt his acts, and compel him to restore their fruits.

It comes to the same result if we regard the defendant as trustee ex maleficio. He knew that by his gift the book and the money it represented, and the rights it conferred, were the plaintiff's. He took the book by force, exercised her rights, and obtained the money. It was his duty to do nothing with her property and her rights for his own advantage, and he is, at her election, her trustee ex maleficio of the proceeds of his acts of usurpation. He held the proceeds of the book by same title that he held the book, and as he had no title to the book he had none to its proceeds, and must account to the true owner. Comstock v. Hier, 73 N. Y. 269, 29 Am. Rep. 142.

The judgment should be reversed, new trial granted, referee discharged, costs to abide event.[19]

JONES v. HOAR.

(Supreme Judicial Court of Massachusetts, 1827. 5 Pick. 285.)

Assumpsit upon a promissory note, for goods sold and delivered, and for money had and received. The case came before the Court upon an agreed statement of facts.

The defendant brought a sum of money into court generally, "on account and in satisfaction of the plaintiff's damages in the suit."

The cause of action upon which the count for goods sold was founded was, that the defendant had entered upon the plaintiff's land and cut and carried away a quantity of white oak timber. And the ques-

[19] Accord: Casey v. Lincoln Nat. Bk. of New York (1903) 83 App. Div. 91, 82 N. Y. Supp. 525. See also Siems v. Pierre Savings Bank (1895) 7 S. D. 338, 64 N. W. 167.

Compare Asher v. Wallis (1708) 11 Mod. 146 (briefly stated in note, page 15, supra).

tion was argued (in writing) whether the plaintiff could waive the tort and sue in assumpsit, it not appearing that the timber had been sold by the defendant. Nothing was said in the argument, nor at the trial in the court below, of the effect of bringing money into court in the manner above mentioned.

At October term, 1826, the Court observed, that by the statement of facts, they were to decide upon the legal effect of bringing money into court under the rule in this case; and they suggested whether it was not an admission of all the contracts set forth in the declaration.

PER CURIAM. It is clear, both from authority and upon principle, that the defendant should have specified on what count he brought in the money. But under the circumstances of this case he may be entitled to relief.

PARKER, C. J. The plaintiff declares in assumpsit, and one count is for goods sold and delivered. By the agreement it appears, that the only ground for supporting this count is, that the defendant cut and took away certain trees from land claimed by the plaintiff, and for the purpose of the argument, actually owned by him. The proper action would undoubtedly be trespass for the injury to the land, or trover for the trees. But the plaintiff contends that he has a right to waive the tort, and charge the defendant with the trees as sold to him. Upon examination of the authorities cited, which are well summed up and commented upon by Strong, J., in the opinion of the Court of Common Pleas, we are satisfied that the plaintiff cannot maintain this position. There is no contract express or implied between the parties, and therefore an action ex contractu will not lie. The whole extent of the doctrine, as gathered from the books, seems to be, that one whose goods have been taken from him or detained unlawfully, whereby he has a right to an action of trespass or trover, may, if the wrongdoer sell the goods and receive the money, wave the tort, affirm the sale, and have an action for money had and received for the proceeds. No case can be shown where assumpsit as for goods sold lay in such case, except it be against the executor of the wrongdoer, the tort being extinguished by the death, and no other remedy but assumpsit against the executor remaining.[20] Such was the case of Hambly v. Trott, referred to in Judge Strong's opinion.

But the defendant paid money into court, under a rule, and did not distinguish as to which of the counts the payment was applicable. And this, by the authorities, is an admission of the contract as set forth in the declaration. Bennett v. Francis, 2 B. & P. 550. It is however considered as within the discretion of the Court to apply this rule or not, as equity shall require; for it may happen that by mere inadver-

[20] "Even if the intestate had been liable in tort, we are not prepared to assent to the proposition that an action of contract will lie against an administrator for a tort of his intestate, for which no action of contract could have been sustained against him." Cooper v. Cooper (1888) 147 Mass. 370, 17 N. E. 892, 9 Am. St. Rep. 721, page 439, supra.

tency where there are several counts, a general tender is made, when it is intended only to be made to one or more, but not to all the counts. In the case before us there is a count upon a promissory note, and we have been satisfied that it was meant that the money paid should be applied to that count only, a litigation in regard to the price claimed for trees, and the right of action in relation to them, being always intended. So it was considered by the Court of Common Pleas, who gave judgment without any reference whatever to the tender, their attention not having been called to it by the counsel. We think therefore the defendant ought to be relieved from the effect of an admission which is the technical result of bringing money into court in the form used in this case. Leave is granted to amend the rule.[21]

[21] In Watson v. Stever (1872) 25 Mich. 386, Cooley, J., said: "There are not wanting decisions which support the rulings of the circuit judge; but the great weight of authority, as well as the tendency of recent decisions, is the other way. If one has taken possession of property, and sold or disposed of it, and received money or money's worth therefor, the owner is not compellable to treat him as a wrong-doer, but may affirm the sale as made on his behalf, and demand in this form of action the benefit of the transaction. But we can not safely say the law will go very much further than this in implying a promise, where the circumstances repel all implication of a promise in fact. Damages for a trespass are not in general recoverable in assumpsit; and in the case of the taking of personal property, it is generally held essential that a sale by the defendant should be shown."

See, also, Sandeen v. Kansas City, etc., R. Co. (1883) 79 Mo. 278.

"To entitle the plaintiff to maintain an action for money had and received, it is not indispensable for him to prove that money actually came to the defendant's hands. Where property, either real or personal, is received as money, or as money's worth, the plaintiff may elect so to treat it, and recover accordingly." Strickland v. Burns (1848) 14 Ala. 511; Miller v. Miller (1828) 7 Pick. 133, 19 Am. Dec. 264.

A converter who exchanges the converted chattel for other property can not be sued in assumpsit where the rule of Jones v. Hoar prevails. Fuller v. Duren (1860) 36 Ala. 73, 76 Am. Dec. 318; Kidney v. Persons (1868) 41 Vt. 386, 98 Am. Dec. 595.

Bailor v. Bailee.—In Bates v. Bigby (1905) 123 Ga. 727, 51 S. E. 717, it is said: "This court has held that where one wrongfully takes the personalty of another and converts it to his own use in some manner other than by a sale and receipt of money therefor, the owner is restricted to his right of action ex delicto—he cannot waive the tort and sue ex contractu. Cragg v. Arendale, 113 Ga. 181, and cit. Where, however, a contractual relation exists between the parties, such as that of bailor and bailee, so that the latter rightfully obtains possession of the property, a tort arising out of a breach of the bailee's duty imposed by his relation may be waived by the bailor and assumpsit maintained, the reason being that the relation of the parties out of which the duty violated grew, had its inception in contract. 4 Cyc. 331, 332; Zell v. Dunkle, 156 Pa. 353, 27 Atl. 38; Tindall v. McCarthy, 44 S. C. 487, 22 S. E. 734."

See, also, B. B. Ford & Co. v. Atlantic Compress Co. (1912) 138 Ga. 496, 75 S. E. 609, Ann. Cas. 1913D, 226.

ABBOTT v. BLOSSOM.

(Supreme Court of New York, General Term, 1873. 66 Barb. 353.)

Appeal by the plaintiff from a judgment of nonsuit rendered at the Wayne circuit.

TALCOTT, J.[22] One Graham, a carpenter and joiner, of whose effects the plaintiff is receiver, entered into a contract with the defendant to put certain repairs on the defendant's house. Graham was to furnish the necessary lumber, and the defendant was to draw it from the points where Graham furnished it to the place where the house was to be repaired. There was no separate price to be paid for the lumber, but the work and materials, when the job was completed, were to be paid for at a fixed price. Graham selected the lumber to be used by him upon the job, and the defendant drew it to the place where the job was to be done. Graham failed to commence work upon the job, and abandoned the contract, and the defendant employed other parties to do the repairs, and used the said lumber in making them. The plaintiff, as receiver of the property and effects of Graham, brought this action against the defendant to recover the value of the lumber as goods, &c., sold and delivered. But two questions are presented on the appeal: 1. Whether, under the circumstances, the lumber became the property of the defendant. 2. Whether the conversion can be waived and this action maintained as for goods sold and delivered.

The lumber did not become the property of the defendant. There was no delivery of it with the intent to pass the title. Under such a contract the title to the materials prepared by the builder to affix to the freehold does not pass until they are so affixed. This was expressly decided in Johnson v. Hunt, 11 Wend. 135. See also Andrews v. Durant, 11 N. Y. 40, 62 Am. Dec. 55; Low v. Austin, 20 N. Y. 181.

Some doubt has been thrown over the question whether, in the case of a wrongful conversion of personal property, the owner can waive the tort and sue the wrongdoer in assumpsit as for goods sold and delivered, where the wrongdoer has not sold but retains the goods, by the obiter suggestions of some judges in this state and by some decisions in other states; but we think the better opinion is, that he may do so, at all events, where the wrongdoer has absolutely used the property for his own benefit, changing its condition and character.[23] * * * In various cases it has been decided that upon a fraudulent purchase of goods, the vendor may repudiate the contract as fraudulent and yet maintain an action for goods sold and delivered, on the ground of his right to waive the tortious taking and bring assumpsit for the value.

[22] Portions of the opinion are omitted.

[23] The court here discussed the conflicting views advanced in early New York cases.

Kayser v. Sichel, 34 Barb. 84; Camp v. Pulver, 5 Barb. 91; Roth v. Palmer, 27 Barb. 655.[24] * * *

The principle upon which this right to waive the tort and sue in assumpsit, rests, as we understand it is, that as a party cannot set up or take advantage of his own wrong, he cannot be permitted to say he is not liable for the value of the goods, or for the money received on the sale of them, for the reason that his act of appropriation was a tort. Of course an action for money had and received will not lie, where neither money nor its equivalent has been received. But we see no reason why the right to waive the tort and maintain assumpsit should not be applicable to the case where the defendant has actually appropriated to his own benefit and used up the plaintiff's goods himself, as where he has sold them to another and received the money, though in the former case the action must be for the goods as sold and delivered and not for money had and received. If these views are correct they lead to a reversal of the judgment.

Judgment reversed and new trial ordered, costs to abide the event.[25]

[24] The court here quoted from Cary v. Hotailing, 1 Hill, 311, and Young v. Marshall, 8 Bing. 43.

[25] Accord: T., W. & W. R. W. Co. v. Chew (1873) 67 Ill. 378; Braithwaite v. Akin (1893) 3 N. D. 365, 56 N. W. 133. In the latter case it is said: "There is no allegation in the answer that the interveners ever sold the steamboat, or in any manner received money or money's worth for her. But we are of opinion that this limitation of the doctrine that the tort may be waived is without foundation in reason or principle. The whole doctrine is built upon a fiction. It asserts that what was done in defiance of the owner's rights was in law done with the most perfect regard for his rights; that the wrongdoer has received the money for the owner, or that he has bought the property from the owner at its fair value. This fiction is indulged only in the interests of the owner, and it rests upon the receipt by the wrongdoer of benefits accruing to him from his wrongful acts. Where no benefits are received, the liability is only for the wrong. As this right in the injured party to turn the tort liability into a contract liability stands upon the receipt of benefits by the wrongdoer, is it not beneath the dignity of any tribunal to draw a distinction between the receipt of benefits in the shape of cash and the receipt of benefits in the form of property? In our judgment, the fact that a sale has not been made is unimportant. Not only upon sound principle, but also upon the foundation of strong authority, do we establish the rule in this state that the owner of property converted may waive the tort and sue in assumpsit for the benefits received whenever the tort feasor receives benefits of any kind from the wrong committed, whether by sale or by retention of the converted property, or in any other manner."

The very evenly divided authorities on the question raised in the principal case and in Jones v. Hoar, page 595, supra, are collected in 4 Cyc. 334.

An anomalous doctrine is announced in Evans v. Miller (1880) 58 Miss. 120, 38 Am. Rep. 313: "So long as the trespasser retains, in its original shape, the property taken, he may logically deny that he holds it under a contract, and demand that he be proceeded against in tort, and that the tort be established against him; but when he has parted with it, either for money or other property, or when he has mingled it with his own, consumed it in its use, or changed its form, he should not be permitted to deny the assumption to pay its value which the law imputes from his method of dealing with it."

In Heinze v. McKinnon (1913) 205 Fed. 366, 123 C. C. A. 492, it was held that, if a converter of plaintiff's chattels sells the same, plaintiff cannot sue for their value, but is limited to the proceeds of the sale.

Contra: Anderson v. Bank (1896) 5 N. D. 451, 67 N. W. 821.

STOCKETT v. WATKINS.

(Court of Appeals of Maryland, 1830. 2 Gill & J. 326, 20 Am. Dec. 438.)

Error to Anne Arundel County Court.

Joseph N. Stockett was for a number of years in unlawful possession of certain negro slaves to which Nicholas Watkins, the plaintiff's intestate, was rightfully entitled. Stockett finally surrendered up the slaves upon an adjudication of the title in favor of Watkins. The present action of assumpsit was then brought by Watkins and upon his death continued by his administrators, the present plaintiffs, against Stockett, to recover (among other things) for the labor and services of such negroes during the time that they were in the possession of Stockett. From a verdict in favor of plaintiffs, the defendant brought a writ of error.

EARLE, J.[26] The two other prayers on behalf of the plaintiffs, as well as the last offered by the defendant, refer to the negro property, and will be disposed of by us in a few words. They rest upon different principles, and we entirely concur, with the Court, that the action as to the work and labor of the servants may be sustained. Supposing Joseph N. Stockett to have possessed them as a trespasser from the first to the last of the tedious law suit, between him and Nicholas Watkins, the tort may be waived, and the action of assumpsit supported. This right to waive the direct injury, and adopt assumpsit, is universal, where the chattel taken, has been turned into money. And it has been sustained in some instances, where the chattel has not been parted from by the trespasser. For the distinctions on this subject, vide Hambly v. Trott, Cowp. 375. The present case however differs in its facts from most of the cases decided on this head. The negroes have been restored to Nicholas Watkins, and the claim is for damages for the tort, committed by the trespasser in seising them, and detaining them from the owner. That this kind of tort may also be waived, and an action substituted for it, on the implied contract, is fully established by the modern authorities, and is in fact in principle like the old cases reported on this doctrine. Lightly v. Coulston, 1 Taunt. 112, and Foster v. Stewart, 3 Maul. & Selw. 197, may be consulted, and they will be found decisive on the point. The last was the case of an apprentice, seduced from the service of his master, where the seduction was waived, and an assumpsit for the work and labor of the apprentice, supported by Ld. Ellenborough, and the whole Court. * * *

Judgment reversed and procedendo awarded.[27]

[26] The facts have been rewritten, and some of the facts and portions of the opinion involving other questions discussed by the court are omitted.

[27] Accord: Janes v. Buzzard (Arkansas Territory, 1834) Hempst. 240, Fed. Cas. No. 7,206a.

Contra: Crow v. Boyd's Administrators (1849) 17 Ala. 51 (relying on the rule of Jones v. Hoar, page 595, supra).

In Norden v. Jones (1873) 33 Wis. 600, 14 Am. Rep. 782, an action on book

BECHTEL v. CHASE.

(Supreme Court of California, 1909. 156 Cal. 707, 106 Pac. 81.)

Department 1. Appeal from an order of the Superior Court, Riverside County, refusing a new trial; B. F. Bledsoe, Judge.

SLOSS, J.[28] This action was brought against the administrator with the will annexed of the estate of Charles D. Foster, deceased to recover from said estate the sum of $7,550, principal, and interest thereon from January 1, 1904, at the rate of 6 per cent. per annum. * * *

As will be seen from the above statement of the pleadings, the action is, as to each count of the complaint, one to recover the purchase price of personal property alleged to have been sold for a stated price and delivered. The actual transaction between the parties was, however, something very different from such sale. Taking the evidence

account, the defendant filed a counterclaim and on the trial offered to prove an item in his account of $6 for pasturing plaintiff's cattle, and testified that plaintiff laid down his fence and let the cattle into the pasture. This item was rejected in the justice court but was allowed upon appeal to the circuit court. Dixon, C. J., said: "The question presented on the rejection of the $6 item is an interesting one, upon which there exists considerable contrariety of opinion and decision, both in England and this country. It was a charge of that sum made by the defendant against the plaintiff for pasturing the plaintiff's cattle, which the defendant testified the plaintiff had let into his, the defendant's, field, by laying down defendant's fence for that purpose. The objection sustained by the justice was, that the laying down of the fence and turning in of the cattle was a trespass on the part of the plaintiff, which could not be brought in or proved as a set-off or cross-demand in this form of action, but that the defendant must resort to his action of trespass against the plaintiff to recover the damages which he has sustained. It is not to be denied that there are numerous decisions of most respectable courts sustaining this view, while on the other hand there is an equal weight of most respectable authority also for holding that a promise to pay will be implied under such circumstances, upon which an action of assumpsit may likewise be maintained. The question being new in this court under our present statutes, we are at liberty to adopt such rule as in our judgment will best subserve the ends of justice, which is or ought to be the object of all rules laid down in the course of judicial proceedings. * * * The underlying question in all the cases obviously is, When and under what circumstances will the law imply a promise on the part of the defendant to pay? 'It is a principle well settled,' say the court, in Webster v. Drinkwater, 5 Greenl. (Me.) 322, 17 Am. Dec. 238, 'that a promise is not implied against or without the consent of the person attempted to be charged by it. And where one is implied, it is because the party intended it should be, or because natural justice plainly requires it, in consideration of some benefit received.' Tested by the latter as the governing principle upon which the law raises a promise to pay, it is very obvious that the more liberal rule is the correct one, and that which should prevail."

In Fanson v. Linsley (1878) 20 Kan. 235, recovery was allowed by way of set-off for the value of the wrongful use of a threshing machine.

The right of a holder of a patent to recover for the profits received by an infringer of the patent is analogous to the doctrine announced in the principal case. Head v. Porter (C. C. 1895) 70 Fed. 498.

By act of Congress in 1910 (Act June 25, 1910, 36 Stat. 851, c. 423) the jurisdiction of the Court of Claims was enlarged to include cases involving the unauthorized use of a patented invention by an officer of the United States. See Crozier v. Krapp (1911) 224 U. S. 290, 32 Sup. Ct. 488, 56 L. Ed. 771. See, also, note, page 44, supra.

[28] The court's statement of the pleadings is omitted and a portion of the opinion, discussing a point of pleading, is omitted.

in the light most favorable to the appellant's claim, it may be said to have disclosed substantially the following state of facts: The Northern Investment Company was a corporation organized under the laws of Kentucky. It had executed certain promissory notes, some of which were owned and held by the plaintiff and one Grubb; plaintiff's interest in said notes being $^{151}/_{316}$. The Northern Investment Company became involved in financial difficulties, and Foster, who was its president, undertook a scheme of reorganization. A new corporation, the Mercantile Realty Company, was to be formed to take over the property of the Northern Investment Company. Holders of notes of the Northern Investment Company were requested to surrender their notes and take in exchange therefor preferred stock of the Mercantile Realty Company at par. Letters urging the plaintiff to surrender his notes and accept stock of the Mercantile Realty Company upon this basis were written by Foster, and plaintiff finally consented to make the exchange. He surrendered his Northern Investment Company notes to Foster and received in exchange preferred stock of the Mercantile Realty Company of the par value of $7,550, together with $6.68 in cash; the total, $7,556.68, representing the amount then due on plaintiff's interest in the notes. We may assume for the purposes of this discussion that the evidence supports the plaintiff's contentions that the agreement in question was made by Foster personally and not on behalf of the Mercantile Realty Company; that Foster falsely and fraudulently represented to plaintiff that the preferred stock of the Mercantile Realty Company was worth its par value; and that the plaintiff believed these fraudulent representations and entered into the agreement in reliance upon them; and, further, that the said stock was in fact worthless.

So assuming, it may be conceded that plaintiff had a right of action against Foster for any damage sustained by reason of the fraud practiced upon him. But we are entirely unable to see how the circumstances above detailed could be held to constitute a sale by Bechtel to Foster of the notes of the Northern Investment Company for $7,550. The transaction was not a sale of the notes for an agreed price, but was one whereby the notes were transferred in consideration of the issue to plaintiff of preferred stock in the corporation. The plaintiff might proceed in any one of various ways to seek relief for the fraud practiced upon him in inducing him to exchange his notes for worthless stock. He might rescind the transaction and recover the notes which he had been induced to turn over; he might perhaps, treating the transfer of the notes as void, recover them or their value without rescission. Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1030. He might bring an action for the deceit practiced upon him and recover such damage as he could show to have been suffered by him. In such last-mentioned action the measure of recovery might be the same as that here sought, i. e., the value which the pre-

ferred stock would have had if the false representations made with regard to it had been true. Cruess v. Fessler, 39 Cal. 336; Spreckels v. Gorrill, 152 Cal. 383, 92 Pac. 1011. But on no possible theory can it be said that the fact that an exchange of property was induced by a fraud would amount to proof that the property surrendered was sold to the wrongdoer for an agreed sum of money.

The plaintiff seeks to bring the case within the rule that, where personal property is wrongfully converted, the injured party may "waive the tort and sue in assumpsit." In many jurisdictions this doctrine is limited to cases where the wrongdoer has sold the property or otherwise converted it into money, in which event the plaintiff may maintain an action for the proceeds. 4 Cyc. 332. In this state, however, as in a number of others, a broader rule enables one whose goods are wrongfully taken and used by another to sue in assumpsit for their value as for goods sold and delivered. Roberts v. Evans, 43 Cal. 380; Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; Chittenden v. Pratt, 89 Cal. 178, 26 Pac. 626. But the application of this rule, even in its more liberal form, cannot be extended to a case where plaintiff has voluntarily parted with his property in exchange for something received by him in return. The very basis of the "waiver of tort" is that plaintiff consents to the taking of his property and affirms the act of the wrongdoer. He treats it as a sale, and recovers the value, due him under an implied contract of sale. But where he has actually agreed to an exchange, which is executed, his affirmance of the transaction is an affirmance of it as a whole. Having parted with his property for an agreed consideration, he cannot, while relying upon his transfer as one made pursuant to contract, hold the defendant to the payment of any other consideration than the one agreed upon. No contract will be implied by the law as against an express contract not disavowed by either party. So long as plaintiff treats the transfer of the notes to Foster as valid, his only remedy for the fraud alleged by him is by means of an action in tort to recover damages therefor. * * *

The order denying a new trial is affirmed.

FERGUSON v. CARRINGTON.

(Court of King's Bench, 1829. 9 Barn. & C. 59.)

Assumpsit for goods sold and delivered. Plea, general issue. At the trial before Lord Tenterden, C. J., at the London sittings after last term, it appeared that the plaintiffs, between the 29th of March and the 12th of May 1828, sold to the defendant various quantities of goods, amounting in the whole to £282., which, by the contract of sale, were to be paid for by bills accepted by the defendant; and that such acceptances were given, but had not become due at the time

when the action was commenced. It appeared further, that the defendant immediately after receiving the goods, sold them at reduced prices to other persons. It was contended, under these circumstances, that it was manifest that the defendant purchased the goods with the preconceived design of not paying for them; and that, as he had sold them, the plaintiffs might maintain an action to recover the value though the bills were not due. Lord Tenterden, C. J., was of opinion, that if the defendant had obtained the goods with a preconceived design of not paying for them, no property passed to him by the contract of sale, and that it was competent to the plaintiffs to have brought trover, and to have treated the contract as a nullity, and to have considered the defendant not as a purchaser of the goods, but as a person who had tortiously got possession of them; but that the plaintiffs by bringing assumpsit had affirmed that, at the time of the action brought, there was a contract existing between them and the defendant. The only contract proved, was a sale of goods on credit. The time of credit had not expired, and consequently the action was brought too soon.

F. Pollock now moved for a new trial, and contended, that the plaintiffs might sue for the price of the goods without waiting until the expiration of the credit given; that credit having been obtained in pursuance of a fraudulent design to cheat the plaintiffs.

BAYLEY, J. The plaintiffs have affirmed the contract by bringing this action. The contract proved was a sale on credit, and where there is an express contract, the law will not imply one.

LITTLEDALE, J. At the time when this action was brought, the defendant was not bound by the contract between him and the plaintiffs to pay for the goods. The plaintiffs claim to recover for breach of the contract.

PARKE, J. As long as the contract existed, the plaintiffs were bound to sue on that contract. They might have treated that contract as void on the ground of fraud, and brought trover. By bringing this action, they affirm the contract made between them and the defendant.

Rule refused.[29]

[29] Accord: Hogan v. Shee (1797) 2 Esp. 522; Kellogg v. Turple (1879) 93 Ill. 265, 34 Am. Rep. 163; Emerson v. Detroit Spring Co. (1894) 100 Mich. 127, 58 N. W. 659.

CROWN CYCLE CO. v. BROWN.

(Supreme Court of Oregon, 1901. 39 Or. 285, 64 Pac. 451.)

Appeal from circuit court, Multnomah county; Alfred F. Sears, Judge.

Action by Crown Cycle Company against Sherman D. Brown to recover the value of goods sold and delivered to defendant. From a judgment in favor of plaintiff, defendant appeals.

WOLVERTON, J. The amended complaint herein, omitting formal allegations, runs as follows: "That on or about the 1st day of March, 1896, the plaintiff, at the special instance and request of the defendant, sold and delivered to defendant certain goods, wares, and merchandise, of the reasonable value of $12,234." The answer denies that the plaintiff sold or delivered to the defendant any goods, wares, or merchandise whatever, except under a special contract of purchase and sale between them, which provided for the payment of a stipulated price at a time certain, which had not elapsed at the commencement of the action. It is further alleged that the goods, wares, and merchandise mentioned in the complaint consist of three lots of bicycles, which were purchased by the defendant from the plaintiff under a special contract as to price, terms, and time of payment; and that, in pursuance of the terms of the contract, the defendant executed and delivered to the plaintiff, as and for the whole of the purchase price of said bicycles, certain bills of exchange, which were received and accepted by plaintiff, and are still held and retained by it. The plaintiff replied that the goods were procured and said contract was induced through the fraudulent and deceitful representations of the defendant as to the condition of his credit; that the said bills of exchange were taken and accepted under those conditions, and are wholly worthless. There was a demurrer interposed to the reply, and a motion to strike out the affirmative averment, which were both overruled. The verdict and judgment being in favor of the plaintiff, the defendant appeals.

The complaint is criticised as not stating a cause of action, but it is deemed sufficient, especially as the criticism comes after verdict. Nicolai v. Krimbel, 29 Or. 76, 84, 43 Pac. 865.

The defendant next urges that the reply constitutes a departure from the ground taken in plaintiff's first pleading. The complaint is in assumpsit for goods sold and delivered on a quantum valebat. The answer pleads, in avoidance of that form of action, a specific contract, and that the time for which credit was accorded under it had not expired. The purpose of the reply is to show that the special contract was a nullity, because induced by fraud, and that the defendant, by reason thereof, was not entitled to the credit given him, and thus to overcome or avoid the defense relied upon. This does not state a new cause of action. True, the plaintiff might have anticipated the defense interposed, and stated the fraud attending the transaction in his com-

plaint, but the more logical method was adopted, to simply state its cause of action on an implied contract, and await the movement of its adversary, and, when the specific contract was interposed, then to show that, by reason of the fraud practiced in its procurement, it was ineffectual for the purpose designed by the pleader. The reply does not quit or depart from the complaint, and state a different cause, nor is anything it contains inconsistent with the cause there stated. The defendant seeks to destroy the plaintiff's right of action by setting up this specific contract, and the reply avoids it, and thus is put upon the record a perfectly logical procedure. The reply may be said to fortify the cause, but it goes no further, and cannot be termed a departure. Mayes v. Stephens, 38 Or. 512, 63 Pac. 760, 64 Pac. 319; Cederson v. Navigation Co., 38 Or. 343, 62 Pac. 637, 63 Pac. 763; Rosby v. Railway Co., 37 Minn. 171, 33 N. W. 698; Shillito Co. v. McClung (C. C.) 45 Fed. 778; Insurance Co. v. Nexsen, 84 Ind. 347, 43 Am. Rep. 91; Ankeny v. Clark, 148 U. S. 345, 13 Sup. Ct. 617, 37 L. Ed. 475.

The most important question attending this controversy is whether the plaintiff can waive the tort and sue in assumpsit for goods sold on a quantum valebat. Upon this question the authorities are in hopeless conflict, and we will make no attempt to reconcile or distinguish them. The action is for the reasonable value of the bicycles not for an agreed price, so that there is no attempt to sue upon the contract, which it is alleged was fraudulently obtained, or to adopt any of its terms as controlling in any particular or binding upon the parties to the action. Fraud having vitiated the contract, and rendered it voidable, at the election of the plaintiff, it had proceeded by an action in no wise adapted to its enforcement, and thereby it would seem to logically follow that it has proceeded in its disaffirmance. At any rate, the action which it has employed is wholly inconsistent with the existence of the specific contract, so that it cannot be said that by suing in assumpsit it has affirmed any contract that it may have had with the defendant, except the one which may be implied from the acts of the parties.

In a leading case upon the subject (Roth v. Palmer, 27 Barb. [N. Y.] 652, 656), Hogeboom, J., discussing the effect of the waiver of the tort, says: "Does it restore the express contract which has been repudiated for the fraud, or does it leave the parties in the same condition as if no express contract had been made, to such relations as result, by implication of law, from the delivery of the goods by the plaintiffs and their possession by the defendant? On this subject the decisions are conflicting, but I think the weight of authority, as well as the true and logical effect of the various acts of the parties, is to leave the parties to stand upon the rights and obligations resulting from a delivery and the possession of the goods." The proposition is supported by Wilson v. Foree, 6 Johns. (N. Y.) 110, 5 Am. Dec. 195; Pierce v. Drake, 15 Johns. (N. Y.) 475, and other New York authorities, as well as by Dietz's Assignee v. Sutcliffe, 80 Ky. 650,—a case in all particulars like the one at bar. To the same purpose, see Pom. Code Rem. (3d Ed.)

§ 571; Bliss, Code Pl. (3d Ed.) § 15. Whether the vendor may waive the tort until his artful vendee has disposed of the goods and converted them into money is another phase of the question, touching which the authorities are not agreed. There are many of great weight holding that he can. Galvin v. Milling Co., 14 Mont. 508, 37 Pac. 366; Lehmann v. Schmidt, 87 Cal. 15, 25 Pac. 161; Roberts v. Evans, 43 Cal. 380; Norden v. Jones, 33 Wis. 600, 14 Am. Rep. 782; Assurance Co. v. Towle, 65 Wis. 247, 26 N. W. 104; Downs v. Finnegan, 58 Minn. 112, 59 N. W. 981, 49 Am. St. Rep. 488; Gordon v. Bruner, 49 Mo. 570; McCombs v. Church & Co., 9 Lea (Tenn.) 81; Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803; and Challiss v. Wylie, 35 Kan. 506, 11 Pac. 438.

We are inclined to adopt the doctrine of the foregoing authorities as establishing the better rule, namely, that a vendor who has been induced by fraud to part with his goods to a purchaser on a time consideration may, before the same becomes due, sue in assumpsit for their reasonable value, and this before the vendee has converted the same into money. We may say that we are impelled somewhat to this conclusion by a cause of some analogy heretofore decided by this court. We refer to Gove v. Milling Co., 19 Or. 363, 24 Pac. 521, wherein it was held that "when one performs services for another on a special contract, and, for any reason except a voluntary abandonment, fails to fully comply with his contract, and the services and material have been of value to him for whom they were rendered and furnished, he may recover for such material and services their reasonable value, after deducting therefrom any damages the party for whom such materials were furnished and services were rendered has sustained by reason of such failure." The quotation is from the headnote.

There was no attempt on the part of the plaintiff, prior to the institution of the action, to formally rescind the contract, nor was there any offer to return or to surrender the acceptances received in consideration of the sale, but the plaintiff proffered to return them in its reply and at the trial. As against the right of recovery by this method, it is urged that no action accrued to the plaintiff for the reasonable value of the goods until the specific contract was rescinded, and there was an offer to return the acceptances, and that the present action was prematurely brought, to say the least. There is ample authority, however, for proceeding by the method adopted. Ryan v. Brant, 42 Ill. 78; Nichols v. Michael, 23 N. Y. 264, 80 Am. Dec. 259; Wigand v. Sichel, 33 How. Prac. (N. Y.) 174; Claflin v. Taussig, 7 Hun (N. Y.) 223. The authorities seem to be uniform that, where the action is for the recovery of specific property, the tender of return of such acceptances should be made as a condition precedent to the bringing of the action, as the vendee must be placed in statu quo before the vendor is entitled to take it from him, consequently he has no right of action until the tender is made; but there is a distinction recognized by these same

authorities, that where the party proceeds in trespass, or on a quantum valebat, the rule does not apply. Doane v. Lockwood, 115 Ill. 490, 4 N. E. 500.

These considerations affirm the judgment of the court below; and it is so ordered.

HURLEY v. LAMOREAUX.

(Supreme Court of Minnesota, 1882. 29 Minn. 138, 12 N. W. 447.)

Appeal by defendants from an order of the district court for Hennepin county, Young, J., presiding, overruling their demurrer to the complaint.

BERRY, J. The complaint is that on May 1, 1881, the plaintiff "was, and ever since has been and now is, the owner in fee-simple" of certain described premises; that defendants have used and occupied the same from said first day of May; and "that said use and occupation of said premises for said time was and is reasonably worth the sum of $800." For this sum judgment is demanded.

This action is in the nature of assumpsit for use and occupation. It lies only where the relation of landlord and tenant subsists between the parties founded on agreement, express or implied. Taylor, Landlord & Tenant, § 636; Abbott, Tr. Ev. 351; Carpenter v. U. S., 17 Wall. 489, 21 L. Ed. 680; City of Boston v. Binney, 11 Pick. (Mass.) 1, 22 Am. Dec. 353; Mayo v. Fletcher, 14 Pick. (Mass.) 525; Ackerman v. Lyman, 20 Wis. 454; Holmes v. Williams, 16 Minn. 164. As the complaint contains no allegations of any facts showing that the relation of landlord and tenant subsisted between the plaintiff and defendant at the time of the alleged use and occupation, or any part thereof, it fails to state a cause of action, and defendants' demurrer was therefore well taken. The plaintiff appears to claim that he has framed his complaint upon the theory of waiving a tortious entry and occupation of the premises by defendant, and suing upon an implied contract to pay for use and occupation. One obstacle in the way of this claim is that no tortious entry or occupation is in any way alleged. But the insuperable answer to it is found in the authorities above cited, which hold in effect that a trespasser cannot be converted into a tenant without his consent. In other words, to maintain an action for use and occupation, there must have been an agreement, express or implied, by which the relation of landlord and tenant is created between the parties. Privity of contract between them is indispensable.

Order overruling demurrer reversed.[30]

[30] The historical reason for this rule is explained in an article by the late Dean Ames in 2 Harvard Law Review, 377, reprinted in 3 Select Essays in Anglo-American Legal History, 299.
The rule is criticized in an article in 23 Central Law Journal 387 (1887).

PARKS v. MORRIS, LAYFIELD & CO.

(Supreme Court of Appeals of West Virginia, 1907. 63 W. Va. 51, 59 S. E. 753.)

Error to Circuit Court, Ritchie County.

Action by W. H. Parks against Morris, Layfield & Co. Judgment for plaintiff. Defendants bring error.

BRANNON, J.[31] W. H. Parks brought an action of assumpsit in the circuit court of Ritchie county against Morris, Layfield & Co., and recovered a verdict and judgment, and the defendants bring the case to this court. * * *

Parks' demand is for timber cut upon land claimed by him and also claimed adversely to him by Simon Sterne. Morris, Layfield & Co. received a deed from Sterne conveying the timber and cut the timber from the land. Parks claims that Morris, Layfield & Co. made a contract with him for the conditional purchase of the timber. Parks exhibited a deed to him from one H. H. Bennett for the land. Sterne brought an action of ejectment years ago against Parks on account of the latter's claim to the land. Sterne claimed the land under a sale and deed made by the commissioner of forfeited and delinquent lands in 1846, under an old title emanating from the commonwealth of Virginia in 1797, and, claiming that in the conveyance to him from the commissioner of forfeited and delinquent lands there had occurred a mistake in boundary, so that the conveyance ought to have included, but did not, the land in controversy, Sterne brought a chancery suit, stating that owing to such mistake he might be embarrassed in the prosecution in a law court of this action of ejectment, and he sought to have said conveyance corrected so as to give the true boundary of the land. On the trial of this action of assumpsit, Parks gave evidence, as a basis for recovery for the timber, of an alleged contract between him and the defendants.[32] * * *

But though there was no contract to justify a recovery by Parks, we must inquire whether a recovery, in an action of assumpsit, could be had on the ground that the defendants cut and converted to their own use wrongfully by trespass the timber of Parks, belonging to Parks, if even it did belong to him. Parks showed no title paper save the deed to him from Bennett. He traced no title from an original or common source. There is no doubt that an owner of land whose timber is wrongfully taken from it and sold or converted from it by trespass may waive the tort and recover the value of the timber upon the common counts. He may recover on a quantum valebat, if not sold, and for money had and received, if sold. The timber having been converted into personalty by severance, its true owner may recover its

[31] Portions of the opinion have been omitted.

[32] The court found that there was no such contract.

value in assumpsit. Maloney v. Barr, 27 W. Va. 381. The plaintiff himself, by introducing the record of the chancery suit, showed abundantly that the defendants claimed a right to take the timber under an old title dating back to 1797. The plaintiff himself showed that defendants were in actual possession taking the timber under that claim. Parks claimed under a different, hostile title. Thus, it is a contest between two hostile titles. Now, where the title in the plaintiff is plain, and no adverse claim to the land, he may waive the tort of a trespasser taking timber and sue in assumpsit; yet surely the law ought not to convert assumpsit into ejectment for title and mesne profits or trespass, and try title to land.

Baker v. Howell, 6 Serg. & R. (Pa.) 476, thus states the law: "An action for money had and received will not lie for the price of sand taken from a sand bar to which both the plaintiff and defendant claim title, and sold by the defendant." The reason is that assumpsit is for money had and received. The court said it would be strange to convert the trespasser into an agent and sue him for money he received for the same. The court said according to that theory assumpsit could be maintained in one state, where the defendant may be found, and, if title could be tried, the judgment would be conclusive in an action of ejectment for land situated in another state and thus settle title to land in that state. The court said: "It is not in the power of a party to change a local into a transitory action, and try title to land in another county ex directo, where the right to the land is the very foundation of the plaintiff's action. Brown v. Caldwell, 10 Serg. & R. (Pa.) 114, 13 Am. Dec. 660, was an action of replevin for slate taken from land. The action was disallowed. The court said that action 'is to try title to personal property, and replevin will not lie for land.' Title to land cannot be decided in an action merely personal or transitory, no matter whether replevin, trover, or assumpsit." The right to the slate depended on title.

We find in King v. Mason, 42 Ill. 223, 89 Am. Dec. 426, the holding: "Title to real estate cannot be tried in action of assumpsit." In a note to that case in 89 Am. Dec. 429, we find the proposition that a disseisee, "until he has regained seisin and possession by judgment or entry, has no such interest in the land as will give him an interest in the trees which have been severed therefrom and sold during the continuance of the disseisin; and, of course, he has no such interest in the money for which they were sold as will enable him to maintain assumpsit for money had and received. Bigelow v. Jones, 10 Pick. (Mass.) 161. See Baker v. Howell, 6 Serg. & R. (Pa.) 476."

Miller v. Miller, 7 Pick. (Mass.) 135, 19 Am. Dec. 264, holds that an action of assumpsit for trees taken from land and sold will lie, provided that no question is made in regard to the title of the land. "In suits for timber cut and removed, as in this case, the true rule, so far as the title to the land is concerned, is this: The plaintiff out of pos-

session cannot sue for the property severed from the freehold, when the defendant is in possession of the premises from which the property was severed—holding them adversely, in good faith, under claim and color of title. In other words: The personal action cannot be made the means of litigating and determining the title to the real property as between conflicting claimants." Halleck v. Mixer, 16 Cal. 574. The same principle will be found in 4 Cyc. 321.

In Lewis v. Robinson, 10 Watts (Pa.) 338, a party brought assumpsit to recover money for land claimed by him, but sold by the defendant. The title of the parties to the land was in contest. It was held that assumpsit would not lie, "although the plaintiff may have had a good title to it." "If the occupancy of a trespasser, who severs trees or stone from the land of another and converts the property taken to his own use, is such as to create an adverse possession, assumpsit does not lie for the value of such property, for it is a settled principle that title to land cannot be tried ex directo in transitory actions." Downs v. Finnegan, 58 Minn. 113, 59 N. W. 981, 48 Am. St. Rep. 488.

North Haverhill v. Metcalf, 63 N. H. 427, clearly sustains this holding. Mather v. Trinity Church, 3 Serg. & R. (Pa.) 509, 8 Am. Dec. 663, in full opinion and note so holds. For this reason, as the right to those trees depended absolutely on title, this action cannot be maintained. The plaintiff must sue in ejectment for title and mesne profits, or trespass, if he has title. Note in 89 Am. Dec. 429, 430. Therefore, instructions Nos. 2, 7, and 8 for the plaintiff were erroneous because they submitted the question of title to the land to the jury, because the title could not be at all tried in the action. * * *

Our conclusion is to set aside and reverse the verdict and judgment, and remand the case for a new trial.

KIRKMAN v. PHILIPS' HEIRS.

(Supreme Court of Tennessee, 1872. 7 Heisk. 222.)

From the Chancery Court, November Term, 1870. Charles G. Smith, Ch.

NICHOLSON, C. J. Elizabeth Kirkman, as executrix, on the 18th of June, 1870, filed her attachment bill against the heirs and devisees of Thomas Philips, citizens of Ohio, to recover the value of certain machinery, iron, etc., alleged to have been tortiously taken in 1863 or 1864 by one Gibson, by him conveyed to Cincinnati, Ohio, and there delivered to one Moore, and by Moore sold to Thomas Philips and his son, George Philips.

The property so taken and converted by Gibson, Moore, and Philips, is alleged to have been worth twelve or fifteen thousand dollars. Phil-

ips has died testate, and his devisees are made defendants. Lands in Stewart county belonging to the devisees of Philips have been attached, and the bill prays that they may be sold, and the proceeds applied in satisfaction of the debt due the complainant for the machinery, iron, etc., so converted by Philips.

The bill was dismissed by the Chancellor upon demurrer, the cause of demurrer being that the recovery sought by the bill being for a tort, the same was barred by the statute of limitation of three years.

The allegations of the bill make a case of tort in the taking of the machinery and iron, and a conversion by Moore and Philips, but they show clearly that complainant is seeking to recover the value of the property, and not the property itself, or damages for the tort or conversion. The value so sought to be recovered is claimed to be a debt due from Philips originally, and now from the devisees of Philips, who is charged with the last conversion. The bill is therefore maintainable, the tort being, by force of the language of the bill waived, and the value of the property claimed as a debt: Alsbrook v. Hathaway, 3 Sneed, 454; Campbell v. Reeves, 3 Head, 228; Bennett v. Kennerly, Id. 675. Although there are many authorities in other States holding that it is only after property has been converted into money that the tort can be waived, and an action for the money maintained, yet in our own State the doctrine is fully settled, that in a case of conversion the complainant has an election to insist either upon damages for the conversion, or to waive these and sue for the value of the property. If the original owner of the property elect to sue for the property, or for damages for the conversion, the action will be barred by the statute of three years. Code 1858, § 2773. But if the party elects to sue for the value of the property, the action will be barred in six years. Code, § 2775.

It is true, as argued, that a wrongdoer may obtain a title to the property by three years adverse possession, and yet be liable for three years after his title is perfected to pay the original owner the value thereof. This is a necessary consequence of the right which the original owner has to elect whether he will sue for property or its value. During six years his right to sue for the value is as perfect as his right to sue for the property within three years. This right is not interfered with by the provisions of the Code abolishing the distinctions in the forms of actions. The statute of limitations applicable to the cause depends upon the nature and character of the action, and not upon its form. In the case before us, the complainant has elected to waive the tort and to sue for the value of the property converted, and in so doing he is entitled to the benefit of the six years statute. It does not appear on the face of the bill that six years have elapsed from the time of the purchase of the property by Philips until the filing of the bill.

The demurrer was therefore erroneously sustained.

The decree sustaining the demurrer and dismissing the bill is reversed with costs, and the cause remanded for answer and further proceedings.[33]

[33] Contra: Birmingham v. Chesapeake & O. Ry. Co. (1900) 98 Va. 548, 37 S. E. 17.

Where, however, the converter sells the chattel after the right to sue in tort is barred, no cause of action for money had and received accrues as a result of such sale. Currier v. Studley (1893) 159 Mass. 17, 33 N. E. 709.

RES ADJUDICATA AND ELECTION OF REMEDIES.—Because of the principle that no one shall be twice vexed for the same cause, a judgment on the merits in one form of action (whether in favor of plaintiff or defendant) bars all other suits for the same cause of action against the same defendant. Hitchin v. Campbell (1771) 2 Wm. Bl. 827. See also Roberts v. Moss (1907) 127 Ky. 657, 106 S. W. 297, 17 L. R. A. (N. S.) 280.

In some states merely beginning suit in one form of action is held to be a binding election and precludes a suit in the other form of action. Thompson v. Howard (1875) 31 Mich. 309. Other courts, relying on principles of estoppel, do not consider it an election unless the defendant would be prejudiced by the plaintiff's change to another form of action. Gibbs v. Jones (1868) 46 Ill. 319. See also Bolton Mines Co. v. Stokes (1895) 82 Md. 50, 33 Atl. 491, 31 L. R. A. 789. But the doctrine of election does not apply in a case where plaintiff attempts to pursue a remedy to which he is not entitled, viz., suing in assumpsit where the converter has not sold the goods in a state which denies the right to bring assumpsit in such a case. Whipple v. Stephens (1904) 25 R. I. 563, 57 Atl. 375.

Where there are joint or successive converters an additional problem arises. In Terry v. Munger (1890) 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803, it was held that bringing an action of assumpsit against one converter was a ratification of his tort and thus an admission by plaintiff that the other converter came rightfully by the goods. This view is criticized in Huffman v. Hughlett & Pyatt (1883) 79 Tenn. (11 Lea) 549, where the court pointed out that the action in assumpsit against the first converter "is not strictly a waiver of the tort, for the tort is the very foundation of the action," but merely "a waiver of 'the damages for the conversion' and a suing for the value of the property."

The authorities on these matters are discussed in an article in 26 Harvard Law Review, 707.

For a discussion of waiver of tort, in general, see the excellent article in 19 Yale Law Journal, 221.

INDEX

ACCOUNT,
Obligation to, 11 et seq.

ASSIGNMENT,
Of cause of action in quasi contract, 38.

ATTACHMENT,
Duress by fraudulent, 539.
Issuance of, in action of quasi contract, 40.

BENEFIT,
Conferred by mistake, see Mistake.
Conferred under compulsion, see Compulsion.
To defendant, how determined, where services rendered at request, 331, 380, 408 note.
Received by plaintiff, deduction or restoration of, 22; see, also, Contract Partially Performed; Mistake; Waiver of Tort.

BENEFITS VOLUNTARILY CONFERRED WITHOUT CONTRACT,
With intention to claim compensation, 445 et seq.
Debt of defendant, payment of, 445, 446.
Fraud of third party inducing delivery of goods to defendant who innocently consumed them, 450.
Funeral expenses, liability for, 472 et seq.
Estate of deceased, 472.
Husband of deceased, 474, 475.
Notice to husband, 475.
Officious intermeddling, 475 note.
Liability of estate of deceased wife to husband, 477.
Necessaries; liability for, 27, 461 et seq.
Infant, 32 note.
Infant's parent, 466 note.
Lunatic, 27, 461 note.
Pauper, liability of town, 467.
Person contracting to furnish support, 470.
Wife, liability of husband, 465.
Negotiorum gestio, 460 note.
Obligation of another to defendant, performance of, 447, 450.
Officious intermeddling, 447, 460 note, 475 note.
Preservation of life, 461.
Preservation of property, 453 et seq
Salvage, 455 note.
Statutory obligation of defendant, performance of, 478, 480.
Tenant in common, repairs by, 482.
Without expectation of compensation, 428 et seq.
Benefit incidentally conferred, 441, 443.
Improvements by supposed owner of property, 444 note.
Party wall, rebuilding of, 443.
Services donated, 24, 428 et seq.
By member of family, 24, 432.
By supposed slave, 436 note.
By supposed wife, 439.
In expectation of legacy, 436.
In expectation of marriage, 437.
Induced by fraud of defendant, 432 note, 435 note.
Support donated, 429.

COMPROMISE,
Distinguished from mistake, 66, 216.
Based upon mistake of fact, 73.

COMPULSION, BENEFITS CONFERRED UNDER,
Discharge of defendant's obligation, 484 et seq.
Contribution, between co-sureties, 498.
Between joint debtors, 500.
Between statutory co-obligors, 502 note.
Between tort-feasors, 502 et seq.
Innocent trespass, 504.
Negligence, 506, 509.
Principals jointly liable for agent's tort, 503.
Willful tort, 502.
General average, 492.
Indemnity between principal and agent, for agent's innocent trespass, 513.
Of principal for agent's tort, 504 note.
Indemnity of surety by principal, 496.
By undisclosed principal of principal, 497.
Payment, by carrier to consignee of goods converted by defendant, 491.
By town for construction of highway which defendant contracted to build, 489.
To discharge lien of defendant's taxes upon plaintiff's land, 486.
To relieve plaintiff's goods from sale under distress for defendant's rent, 484.
Duress, 516 et seq.
Business, duress of, 523.
Carrier, unlawful charge by, 531.
Goods, duress of, 516 et seq.
Imprisonment, duress of, 566.
Threats of imprisonment, 568 note.
Money actually due, 534 note.
Mortgage of realty by deed absolute, 545 note.
Protest, necessity of, 531, 532 note.
Public officer, unlawful fee by, 527, 529.
Good faith as a defense, 528 note.
Under unconstitutional statute, 529.
Public water supply, unlawful charge for, 523.
Real property, duress of, 540, 545 note.
Retention of benefit by defendant not unconscionable, 534 note.
Stock of corporation, unlawful charge as condition of transfer, 522 note.
Termination of duress, payment made after, 528 note, 533 note.
University, unlawful charge as condition of admission, 525.
Voluntary payment, 533.
Illegality coupled with compulsion, 554 et seq.
Agent, payment to blackmailing, 569.
Arrest for crime, payment to escape, 562.
Extorted by blackmail, 566, 569.
Bankrupt, payment to obtain discharge of, 556.
Blackmail, 566, 569.
Composition agreement, secret payment to creditor, 559.
Compounding a felony, 562.
Duress of imprisonment, 566.
Threats of imprisonment, 568 note, 569.
Usurious contract, unenforceable by statute, 556.
Void by statute, 554.
Legal proceeding, compulsion through, 64, 535 et seq.
Action, 64, 535.
Attachment, foreign, 535.
Fraudulent, 539.
Distress for illegal tax, 547.

COMPULSION, BENEFITS CONFERRED UNDER—Continued,
Foreclosure of mortgage, 546.
Judgment, equitable defense not available, 17.
Newly discovered evidence, 550.
Subsequently reversed, 551.
Materialman's lien, unlawful, 540.

CONTRACT AND QUASI CONTRACT,
Distinction between, 23 et seq.

CONTRACT CLAUSE OF FEDERAL CONSTITUTION,
Applicability of, to a judgment, 48.

CONTRACT PARTIALLY PERFORMED, BENEFITS CONFERRED UNDER,
Illegal contract, 268 et seq.; see also Compulsion.
Contract malum in se, 285 note, 562.
Fraud coupled with illegality, 281, 287.
Illegal part of contract, not performed by plaintiff, 275, 303.
Performed by plaintiff, 278 note, 562.
Illegality of contract unknown to plaintiff at outset, 268, 275.
Marriage brokage contract, 282.
Partnership for illegal purpose, 311 note.
Principal and agent, money received by agent from principal for illegal purpose not performed, 303, 569.
Money received by agent from third party on account of principal, 306, 307.
Public policy favoring recovery, 282, 287.
Statute enacted to protect plaintiff, 278, 280, 554.
Usurious contract, 554, 556.
Wagering contract, action against stakeholder, 270, 275 note, 282.
Action against winner, 274.
Notice of repudiation and demand, 274 note.
Impossible to complete performance,
Further performance by defendant impossible, 233 et seq.
Freight, 233.
Purchase price of property, 235.
Rent, 242.
Services of defendant, 237, 240.
Apportionable, 240.
Not apportionable, 237.
Further performance by plaintiff, impossible, 246 et seq
Freight, 246.
Repairs to property accidentally destroyed, 260 et seq.
Rent, 242.
Services rendered, 249 et seq.
Measure of recovery, 258.
Plaintiff aware of inability to complete performance, 256 note.
Recoupment of defendant's damages, 256.
Stipulation in contract against recovery, 249.
Repudiation or substantial breach,
By defendant, 12, 352 et seq.
Breach by defendant entitling plaintiff to rescind, extent of, 354 note.
Contract providing for rescission, 352.
Measure of recovery, 371 et seq.
Money paid by plaintiff, 371.
Services by plaintiff, contract rate as evidence, 373 et seq.
Benefit to defendant, how determined, 380.
Full performance by plaintiff, 382.
Mutual agreement for rescission, 352.
Property, payment to plaintiff to be in, 384.
Restoration or deduction of benefit received by plaintiff, 356 et seq.

CONTRACT PARTIALLY PERFORMED, BENEFITS CONFERRED UNDER—Continued,
Consideration apportionable, 365 note.
Insurance, 366.
Restoration or apportionment not possible, 360, 363.
Use and occupation, 370.
Seal, contract under, 366.
By plaintiff, 386 et seq.
Building contract, 392 et seq.
Good faith attempt to perform, 393 note, 395 note, 396.
Measure of damages, 399 note.
Possession taken by defendant, 392 et seq.
Substantial performance, 392 et seq.
Willful breach by plaintiff, 399.
Chattel, sale of, by plaintiff, 386, 388.
Good faith attempt to perform, 387 note.
Purchase of land by plaintiff, action for installments paid, 402.
Services, contract for, 404 et seq.
Discharge of plaintiff for cause, 404 et seq.
Installments of pay already accrued, 408.
Recoupment of defendant's damages, 408 note, 413, 426.
Willful abandonment by plaintiff, 413 et seq.
Statute of frauds, contract unenforceable because of,
Defendant repudiates, 312 et seq.
Accrual of cause of action, time of, 339.
Contract for purchase of land by defendant, use and occupation, 316.
For purchase or lease of land by plaintiff, 312, 315, 321.
Not to be completed within one year, 318, 319.
To devise land to plaintiff, 315.
To hold in trust land conveyed to defendant, 339.
Improvements, by lessee, 338 note.
By purchaser, 335.
Measure of recovery, 320 note, 324 et seq.
Contract rate as evidence, 320 note.
Limited to plaintiff's loss, 324.
To defendant's benefit, 328, 331.
Defendant's benefit, how determined, 331.
Payment by plaintiff, by services, 315, 318.
In money or goods, 312, 319, 321.
Return of goods received by defendant, 321.
Use and occupation by plaintiff, deduction for, 312.
Plaintiff repudiates, 341 et seq.
Contract for purchase of land by plaintiff, 341.
Not to be completed within one year, 345, 346.
Void by statute, 350.

CONTRIBUTION,
See Compulsion.

COURT OF CLAIMS,
Jurisdiction of, over quasi contracts, 44 note.

CUSTOMARY OBLIGATION, 1 et seq.

DEBT,
Payment of, by volunteer, 445, 446.

DE FACTO OFFICER,
Recovery of fees from, 14.

DISCHARGE OF DEFENDANT'S OBLIGATION,
See Benefits Voluntarily Conferred; Compulsion.

DURESS,
See Compulsion.

FAILURE OF CONSIDERATION,
See Contract Partially Performed; Mistake.

FORGERY,
See Mistake (of fact).

FRAUD,
Attachment obtained by, duress of, 539.
Coupled with illegality, 281, 287.
Coupled with mistake, 60, 221.
Gift induced by, 432 note.
Gratuitous services induced by, 435 note.
See, also, Waiver of Tort.

FREIGHT,
See Contract Partially Performed.
The mother of wages, 232, 248 note.

FUNERAL EXPENSES,
See Benefits Voluntarily Conferred.

GENERAL AVERAGE, 492.

ILLEGALITY,
See Compulsion; Contract Partially Performed.

IMPLIED CONTRACT,
Meaning of term, in statutes, 37 et seq.

IMPOSSIBILITY,
See Contract Partially Performed.

IMPROVEMENTS,
By lessee under parol lease, 338 note.
By purchaser under parol contract, 335.
By supposed owner of property, 444 note.

INDEMNITY,
See Compulsion.

INFANT,
Liability of,
For money misappropriated, 23.
For necessaries, 32 note.
Liability of parent for infant's necessaries, 466 note.
Liability to parent for services of, by one enticing, 583 note.

JOINDER OF CAUSES OF ACTION,
As applied to quasi contracts, 39 note.

JUDGMENT,
Action on, 9.
Is it a "contract" under statutes regulating procedure, 37 et seq.
Is it within contract clause of federal Constitution, 48.
Nature of, 40 note, 43 note.
Payment of, under compulsion, see Compulsion.

LUNATIC,
Liability of, for necessaries, 27.

MISTAKE, BENEFITS CONFERRED BY,
Mistake of fact, 51 et seq.
Accrual of cause of action, time of, 117, 118 note.
Bank note, validity of, 157.
Bond, validity of, 155, 158.
Change of position by defendant, 96 et seq., 209 note.
Payment by agent to principal, 96, 98.
Collateral fact, 75 et seq.
Compensation for services, 119.

MISTAKE, BENEFITS CONFERRED BY—Continued,
Compromise, distinguished, 66.
Based on mutual mistake, 73.
Credit allowed, 53.
Debt, overpayment of, 51.
Deed, overpayment pursuant to, 53 note.
Existence of contract between the parties, 119 et seq.
Funds of drawer to meet check, 191.
Subject-matter of a contract, 152 et seq.
Forgery, bill of lading, payment of attached draft, 194.
Raised bill or check, payment of, 186 note.
Purchase of, 170 note.
Signature of drawee of bill or check, payment by drawee, 179, 181.
Defendant a volunteer, 189 note.
Discount by drawee, 186.
Negligence of defendant, 187.
Signature of maker of note, payment by maker, 185 note.
Signature of indorser, payment by drawee, 189.
Notice of forgery, diligence in giving, 191 note.
Fraud coupled with mistake, 60.
Identity of subject-matter of contract, 122.
Insolvent estate, payment of debt in full, 87.
Insurance, validity of, 126, 127.
Interest, recovery of, on payment by mistake, 119 note.
Investigation of facts, payment after, 72.
Measure, capacity of, 54, 73.
Mutual, necessity that mistake be, 60, 138.
Nature of subject-matter of a contract, 166 et seq.
Negligence, of plaintiff, 89 et seq.
Of defendant, 187.
Negotiable paper, special rules as to, 179 et seq.
Notice and demand, 111 et seq.
Overdrawn account, payment by drawee, 191.
Patent, validity of, 163.
Payment stopped on check, payment by drawee, 193 note.
Principal and agent, authority of agent to borrow money, 132 et seq.
To execute negotiable paper, 133, 135.
See, also, this title, Change of position.
Purchase for value, 105, 108, 179, 181, 185 note.
Raised bill, validity of, 170, 186 note.
Restoration of property received by plaintiff, necessity of, 151, 178.
Retention of benefit by defendant not unconscionable, 82, 84.
Title to property, 141 et seq., 218.
Real property,
Conveyance by deed, 141.
Parol conveyance, 144.
Contract to convey, 145.
Personal property, 148.
Unilateral, 60.
Validity of, bank note, 157.
Bill of lading attached to draft, 194.
Bond, 155, 158.
Contract between the parties, 119 et seq.
Lease, 160.
Patent, 163.
Raised bill, 170 note, 186 note.
Signatures to negotiable paper, see this title, Forgery.
Value of article sold, 75, 172, 176.
Voluntary payment distinguished, 64, 65.
Mistake of law, 11, 13, 198 et seq.
By officer of the court, 222.
By public official, payment of public funds, 224.
Compromise distinguished, 216.

MISTAKE, BENEFITS CONFERRED BY—Continued,
Construction of a deed, 220 note.
Foreign law, 228.
Fraud coupled with mistake of law, 221.
Reversal of former rule of law, 213.
Rule in courts of equity, 220 note.
Title of property, 218; see, also, 141 et seq.
Validity of bond, 158.

NECESSARIES,
See Benefits Voluntarily Conferred.

NEGATIVE ENRICHMENT, 577.

NEGOTIORUM GESTIO, 460 note.

NOTICE,
Of forgery of indorsement, diligence in giving, 191 note.
Payment by mistake, notice before action, 111 et seq.
Tenant in common, repairs by, 482.
To husband by one paying funeral expenses of wife, 475.
Wagering contract, notice before action, 270, 274 note.

OBLIGATION,
Customary, 1 et seq.
Official, 3.
Record, created by a, 9.
Statutory, 4 et seq., 44.
To account, 11 et seq.

OFFICIAL OBLIGATION, 3.

OFFICIOUS INTERMEDDLING, 447, 460 note, 475 note.

PRINCIPAL AND AGENT,
Deduction of commissions by agent, 22.
Indemnity between, see Compulsion.
Payment by principal to blackmailing agent, 569.
See, also, Contract Partially Performed; Mistake (of fact).

PRINCIPAL AND SURETY,
See Compulsion.

PROCEDURE,
Statutes regulating, as applied to quasi contracts, 37 et seq.

PURCHASE FOR VALUE,
Defense of, 105, 108, 179, 181, 185 note, 591.

QUASI CONTRACT AND CONTRACT,
Distinction between, 23 et seq.

QUASI CONTRACT AND TORT,
Distinction between, 573, 576 note.

RECOGNIZANCE, 10 note.

RECORD,
Obligation created by a, 9, 10 note.

RETENTION OF BENEFIT,
By defendant not unconscionable, 22, 82, 84, 534 note, 586.

RESTORATION OF BENEFIT RECEIVED BY PLAINTIFF,
See Contract Partially Performed; Mistake; Waiver of Tort.

SALVAGE, 455 note.

SET-OFF,
Of cause of action in quasi contract, 37.

STATUTE OF FRAUDS,
See Contract Partially Performed.

STATUTE OF LIMITATIONS,
As applied to quasi contracts, 33 et seq.
Time of accrual of cause of action, benefit conferred by mistake, 117, 118 note.
Contract unenforceable because of statute of frauds, 339.
Waiver of tort, what clause of statute applies, 611.

STATUTORY OBLIGATION, 4 et seq., 44.

STOCKHOLDERS' STATUTORY LIABILITY, 44.

SURVIVAL OF CAUSE OF ACTION,
In quasi contract, 573, 576 note.

TORT AND QUASI CONTRACT,
Distinction between, 573, 576 note.

UNJUST ENRICHMENT,
General principles of, as laid down by Lord Mansfield, 17.

USE AND OCCUPATION,
Liability for, purchaser under parol contract, 316.
Trespasser, 577, 608.
Recoupment for, 312, 370.

USURIOUS CONTRACT,
See Compulsion.

VOLUNTARY PAYMENT, 64, 65, 533, 550.

VOLUNTEER,
See Benefits Voluntarily Conferred.

WAGERING CONTRACT,
See Contract Partially Performed.

WAIVER OF TORT, 14, 15, 23, 573 et seq.
Administrator de son tort, against, 15.
Apprentice, enticement of, liability to master, 582.
Benefit to defendant, necessity of, 584, 585.
Bona fide purchaser, 591.
Constructive trust of money, 593.
Conversion, of goods, 573, 585 et seq.
Credit, fraudulent purchase on, action before expiration of, 603, 605.
Death of converter, liability of estate, 573, 577.
De facto officer, recovery of fees from, 14.
Infant, liability of, for money misappropriated, 23.
For services of enticed, liability to parent, 583 note.
Money, conversion of, 589, 591.
Bona fide purchaser from converter, 591.
Mala fide purchaser from converter, 589.
Negative enrichment, 577.
Prisoner unlawfully detained, action by, 584.
Restoration of property received by plaintiff, 601.
Retention of benefit by defendant not unconscionable, 586.
Reward, liability for, received by wrongful claimant, 594 note.
Sale by converter, necessity of, 595, 598.
Services of apprentice enticed by defendant, liability to master, 582.
Of infant enticed by defendant, liability to parent, 583 note.
Of prisoner unlawfully detained, 584.
Statute of limitation, what clause applies, 611.
Survival of cause of action, 573, 576.
Title to real estate, action involving, 609.
Use and occupation against trespasser, 577, 608.
Use of property by converter, 600.

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